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Transactions of the Fifty-Sixth Annual Meeting of the South Carolina Bar Association

SOUTH CAROLINA BAR ASSOCIATION MEETING

Held at the Cleveland Hotel

Spartanburg, S. C.

At 2:30 O'clock P. M.

March 30, 1950

The meeting was called to order by the Honorable C. T. Graydon, President of the Association, who addressed the Association as follows:

Members of the South Carolina Bar Association:

As your president during the year 1949-1950 I make the annual report on the affairs of your Association. First I will discuss the accomplishments of the Association in the past year; secondly, on the basis of my experience as the head of the Association and as a lawyer with some 37 years' active trial practice, I wish to make certain recommendations for the future, and finally I should like to make a few comments on the duty and opportunity of the lawyer in preserving the American way of life.

I am proud to recount to you some of the things that this Association has accomplished since World War II. We have made a sustained drive to increase the membership of the Association. Approximately 1,000 letters were sent out to lawyers who are not members, and we received some response from this effort. Committees appointed to further the membership drive have done some excellent work, but there is much room for improvement. In a state where there are more than 1,300 lawyers it is a sad commentory that we have only about one-fourth of this number in the Bar Association. My first recommendation to the incoming president is that a committee be appointed in every judicial circuit to invite and urge every member of the Bar to join the Association. We can never hope to accomplish the more serious aims and purposes of our Association until at least a majority of the lawyers in our state are active members.

The Association has cooperated closely and successfully with the law school of the University of South Carolina and, largely through the effort of Dean Prince, much good has been accomplished in bringing together the law school and the Association. We have participated in the establishment of the South Carolina Law Quarterly,

which in time, we feel, will become, as it has already become to some extent, a vital force in the shaping of the laws of this state. Our members have in many instances contributed articles of importance to the journal. The establishment of the law journal is a milestone in the progress of our law school, and I think our Association is entitled to be congratulated upon its part in this undertaking.

The University has, through the efforts of Dean Prince and with some assistance from our Association, constructed a beautiful building to house the law school. South Carolina can be proud of the physical plant of the University Law School as constructed under the guidance of the present law faculty. Our University is now in position to take the lead in the teaching of the law with this superior physical plant.

In connection with this new building, I want to urge as many of you as possible to attend the exercises for the dedication of this building on April 14 and 15. A fine program, with Chief Justice Arthur T. Vanderbilt of the New Jersey Supreme Court as the featured speaker, has been arranged. Dean Prince will make a more detailed announcement about this event.

This cooperation between the law school and the Association should be continued and I recommend that a permanent committee be appointed to carry on this combined effort of the Association and the law school. We should request more of the advice and assistance of the law school in the formation of progressive measures to insure the advancement of the law along with material and political changes.

During my administration as your president I spoke in many parts of the State to groups on various subjects. These speeches received close attention and I feel that in many ways presented to the State the Association in a light which was somewhat favorable. I suggest that the incoming president meet as many engagements as he can throughout the State to carry to the people the message of the Association.

Some of the suggestions which I am making for the future of the Association and for the Bar generally in South Carolina have already been advanced and are under active consideration. Most of my recommendations relate to the field of judicial administration. The substantive law develops each year and is becoming adapted to the needs of these changing times, but the procedural law has not made commensurate advances.

A legal right is worthless, of course, if it cannot be enforced, and often the recovery depends on the speed with which a matter can be handled. The procedural delays do not favor those who are coming

into courts to seek relief, and the business man, as well as the laborer, loses confidence in the courts when they find the procedure so slow and so laborious. The federal rules of criminal and civil procedure are an example of what can be achieved through reform of this branch of the law.

Many specific changes come to mind, and I shall discuss some of these briefly. The American Bar Association's Section of Judicial Administration, under the leadership of the Honorable John J. Parker, has recommended procedural changes of a widespread nature. I feel that our Bar Association should establish a working committee to consider these problems generally. The work cannot be accomplished by a single lawyer or a small group of lawyers. It will require the concerted effort of our judiciary and Bar to effect these changes after careful and deliberate study.

I am aware of the conservative character of our Bar in South Carolina. But I truly believe that many changes in procedure can be accomplished if the facts are pointed out to the Bar and judiciary. We will make some mistakes, but my observation of the federal rules convinces me that the beneficial results of these changes make them highly desirable. I certainly think that no one can be hurt in any way by careful and conscientious study.

The question of court administration becomes more important as the business, financial and industrial enterprises of our state increase in size and scope. I am sure that the lawyers in the principal population centers — Spartanburg, Greenville, Columbia and Charleston — know how a congested docket can delay and prolong litigation.

As your president I made a suggestion for the establishment of a fifteenth circuit, the effect of which would have been to give each of these four places a lone judge. I found, however, that the suggestion did not meet with the approval of either the judges affected, the lawyers or the solicitors in the circuits. As this matter was one which would have to come before the legislature, I determined after the aggitation to let the matter rest with the General Assembly. I also suggested the election of two or four roving judges. This suggestion was made to the General Assembly but was not presented in the form of a bill. The trouble with establishment of new circuits is that in some of the existing circuits there is scarcely enough business to keep the solicitor and the judge employed. In the larger circuits, on the other hand, it is virtually impossible at times to keep up with the work. This is a matter which ultimately will have to be worked out by the legislature in conjunction with the Supreme Court. It calls for either a reorganization of the circuits or the es-

tablishment of some practicable method for the relief of the larger circuits. The presence of the retired judges has helped in some degree in this matter, but even this has not been sufficient to relieve the congestion in the circuits where litigation is heavy.

The establishment of a working judicial council or conference might do much toward the compilation of statistical data in regard to the administration of our courts. It is time that we are able to work out most of our problems under the present informal procedures, but, as litigation increases, attention should be given more formal procedures for use under more complex conditions.

At the last meeting of the Association the establishment of such a council or conference to keep abreast of the changing procedure in the law was suggested. I recommend that this be done — for where these councils exist much progress has been made in relieving the congestion of the courts and stepping up the procedure for the disposition of cases. Such council could meet each year at the same time and place that the Bar Association meets and, in my judgment, could study and recommend changes which are intelligent and worthwhile.

Without criticizing the present courts of our state, I think that the rules of all our courts are in need of study and revision. This is a matter for the determination of the judiciary, but I am certain that the judges would give attentive ear to our recommendations. Many young lawyers tell me that they have great difficulty in determining the exact methods of appellate procedure. The rules in many instances are contradictory and confusing, and much of the procedure is based on custom rather than any definite and clear rule.

There are also changes needed in our trial practice. I personally am of the opinion that the prerogatives given a federal judge in the conduct of a jury trial deserve some consideration by our state Bar. Many jurors have informed me that they were not clear on the issues involved in a case, and this was so through no fault of the trial judge or the attorneys in the case.

I made a sincere effort to carry forward the pre-trial conference regulation. I wrote many letters and had many conferences with the lawyers over the state with reference to this, and I found that in the smaller counties the lawyers do not consider this procedure necessary and in the larger counties the sentiment is almost equally divided as to the advisability to it. I do not feel, with the present sentiment in South Carolina, that there is any chance to pass a pre-trial conference rule set up through the Bar Association, and it is my judgment that matters of this kind will have to be handled by

the Bar Association in conjunction with the Supreme and Circuit Courts and the chairmen of the Senate and House Judiciary Committees. I therefore recommend that an act be proposed through the Judiciary Committees of each branch of the legislature to give to the Supreme Court and an advisory committee appointed by that Court, the right to make rules of procedure even where such rules would abrogate a statute. I would further advise and recommend that the legislature appoint a committee to study the change in the rules necessary or expedient and report the findings back to the Supreme Court and to the legislature for action. In this way, we at least can get started on a sound program to change our rules of procedure which have not been materially changed in more than seventy-five years. We have let the train of progress overtake us and leave us, and we should attempt to catch up with those states which have improved the procedure in the courts. I do not feel that this can be done through the Bar Association except in an advisory capacity and I therefore sincerely recommend that the matter be taken up with the General Assembly to appoint this committee and give it some funds to make an investigation and an intelligent report in the matter. No rules should be changed without the consent of the Supreme Court nor without the consent of the legislature; but the Supreme Court should be given full power through this committee suggested to make the proper changes.

It would seem that I believe in change and revision. Those of you who know my political and economic views would not class me as a conservative. But I do not make these recommendations for changes without careful and conscientious study based on my rather varied experience in the practice of law.

I should like to comment briefly on the organization of our Association and make some recommendations in regard to its set-up.

The present organization of the Bar Association, in my judgment, is entirely too cumbersome. It is set up on the basis of the judicial circuits with a vice-president in each circuit and an executive vice-president, making a total number of fifteen vice-presidents. It is impossible to ever get fourteen people to meet in a conference and these offices are in the main honorary positions. I suggest that the Association be set up on the basis of the six congressional districts which would give a vice-president for each congressional district except the district from which the president comes. This group would constitute a small, compact organization, which is desirable and which could function with great success in the Bar. I recommend that the incoming president appoint a committee to work out

some plan whereby the vice-presidents will be fewer and more active.

The changing of the Executive Committee each year, though not allowing the members of the committee to hold over, is a wholesome rule. I further feel that the selection of the members of the committee from different parts of the state is very helpful, but I am of the opinion that there should always be a member of the committee from Columbia as most of the work of the Association is done there. The presence of this committeeman in Columbia enables him to keep in close touch with the secretary, who has the burden of the preparing for the annual convention. The Association is fortunate in having a secretary who has performed these duties efficiently throughout the last several years. The Association should have a fulltime secretary but the present limited membership and finances do not permit this. I strongly recommend that the Association work for the employment of a fulltime secretary who can give his entire time and attention to the organization of the Bar in our state.

Although it often seems that the chief purpose of the Association is social, I feel strongly that these gatherings foster expression of ideas on the law and provoke progressive thinking among the members of the Bar. Life is not all play — nor is life all work — and the delightful contacts made at the meetings of the Association constitute some of the most pleasant and agreeable episodes in life.

We are here in a very real sense to reaffirm our faith and belief in the American way of life. On the international front — despite the Iron Curtain and some set-backs in the Far East — our prestige is at an all-time high. We are united, as never before, in our foreign policy, but on the home front we are ofttimes confused and in doubt. The responsibility for preserving the constitutional rights of our citizens rests on us as lawyers.

I have observed with deep concern the gradual abrogation of the rights of the individual. If there is any principle which I thought was accepted by all our people, it is the right of the individual to be immune from search and seizure, the right of the individual not to be entrapped, the right of the individual not to have his privacy invaded by law enforcement officers. Yet our highest court — by a divided opinion — has to a great measure nullified this protection against search and seizure. What will be the next step — and when will this effort to take away inalienable rights born of experience in democratic government end? The Bar should take a militant and positive attitude toward the preservation of the rights guaranteed in the Constitutions of state and nation. Many of us accumulate property to leave our families, and that is a worthy effort. But how

much more necessary it is for us to preserve and protect the coming generations from the encroachment on these fundamental principles of our democracy.

Our courts are the final fortress of our freedom. They are the last line of defense in a democracy. In some of our courts too much consideration has been given to militant minorities. Those representing such minorities, in many instances opposed to our way of living, have little difficulty in securing full and complete hearings in the courts. Ordinary citizens who have causes before the courts find it difficult to secure a review of their rights under our present court procedure. Too much consideration is being given to the protection of these minorities and too little consideration to the protection of the large body of the public who constitute the backbone of the country.

Some say that it is impossible for the courts to review all cases involving the liberty of the individual and the preservation of his inherent rights in both the criminal and the civil courts. This is an admission, to my mind, that democracy cannot be made to work, and I do not believe it — for, as the country grows, more judges can be appointed and more courts established. In the beginning the United States Supreme Court had only three judges. The population of this nation has increased almost fortyfold and we now have nine judges. Other courts have been established, and other courts can be established giving to individuals the right to review their complaints and the right to have a final decision on matters of importance to them. Under our form of government the individual lowest in the economic or social scale should be protected, and whenever we admit that we cannot protect this class it is an almost fatal indictment of our way of life. We abhor the totalitarian state which regiments people and decides catagorically what rights each citizen will enjoy. But ofttimes our plain citizens receive a similar type of justice through the courts' refusal to act in cases involving their rights. Militant minorities and groups which are organized and which have the funds to carry on appeals should not be given any preference. Communists, Nazis, Fascists, and other groups with patriotic names — organizations which are attempting to destroy our way of life — should receive no more protection than the ordinary man of the street.

As I look back over the history of our nation I am proud of the part that the lawyers played in the establishment of this great nation. I am proud of the many contributions that our profession has made to the perpetuation of our way of life and our democratic processes.

The history of this country cannot be reviewed without mentioning a galaxy of names trained in the legal profession. What would this country be or how could it have ever come into being without Rutledge and Jefferson? Could it have continued without Lincoln, Jackson, Franklin Roosevelt? How important it is for us to be mindful also of the great influence of our profession on the affairs of our nation. Let us, in our small way, as members of this Association and members of our honorable profession, continue to carry the torch of freedom, aloft from the slime of prejudice, aloft from the fog of uncertainty, aloft from shifting winds of uncertainty which dim and often destroy the light of freedom and the security of our institutions.

There is no more beautiful sight than the crystal glory of a clear, starry night. As we look into the Heavens we see Venus, silver and brilliant; we see Mars, red and forbidding; we see the dog star above us and all of the various constellations shedding their light upon us. And so it is in life. We see Jefferson, the great political thinker, clear and scintilating; we see Jackson, the doer of great deeds, and Lincoln, the preserver of the Union. But we cannot all be stars of that magnitude. We cannot all be known by name in the foundation and preservation of our nation. The glory of the night is not dependent upon the light of these known stars, but there are millions of stars unknown and invisible which combine together and form the milky way that sheds its soft and ever present light in the sky and upon the earth beneath. So with us, if we, in our small way, keep our light clear, high and aloft it will shed upon those things which make for better life and citizenship, and will be the glory of our profession and we will help those who come after us to preserve the position and continued service of our profession. Let us, therefore, in our limited sphere, so conduct ourselves and set such an example as to add glory and honor to our profession even as the milky way lights the beautiful night.

Upon conclusion of the address by the president, Walter S. Monteith, Secretary and Treasurer of the Association, rendered his Report as follows:

REPORT OF SECRETARY-TREASURER FOR YEAR 1950

Balance 1949 Report	$ 173.98
Total 1949-1950 Dues Collected through March 25, 1950	6,667.50
Total	$6,841.48

Expenditures

Orchestra — 1949 Meeting	$ 65.00	
Fort Sumter Hotel — 1949 Meeting	1,487.25	
Ladies' Tea and Miscellaneous — 1949 Meeting	303.58	
Refreshments — 1949 Meeting	206.10	
Grievance Committee — Mileage, Meals and Hotel	245.58	
Stenographic Costs — Hearings of Grievance Committee	311.20	
Postage and Telephone	72.05	
Printing	44.80	
Supplies	86.10	
S. C. Law Quarterly	600.00	
Mileage — Secretary	27.00	
Flowers — Deceased Members	17.98	
Delegate — American Bar	67.00	
Bank Charges	5.20	
Salary of Secretary	600.00	
Total Expenditures		4,138.84
Cash in Bank March 25, 1950		$2,702.64

Upon the completion of the Secretary-Treasurer's Report, the President appointed an Auditing Committee, composed of Mr. Dave Gaston, Jr., Chairman, Mr. John M. Spratt, and Mr. W. H. Harley, requesting said Committee to audit the books of the Secretary-Treasurer and to report its findings at the business meeting the next day.

The President then appointed the following Committee to pass upon the applications for new members and to render its report at the business meeting the next day: Mr. J. Claude Fort, Chairman, Mr. Thomas McCutchen, and Mr. Edward Pritchard.

The Report of the Committee on Judicial Administration and Remedial Procedure was then presented by Mr. Allston Moore. Mr. Moore rendered his Report orally, stating that his Committee on last year had rendered a Report in which it recommended the adoption of a Pre-Trial Conference. Mr. Moore further stated that his Committee was still of the opinion that such a procedure was necessary in some cases throughout the Courts of South Carolina, and he recommended that the matter of Pre-Trial Conferences be further considered, along with the revision of the Rules of Appeal as recommended by Mr. Graydon in his Address to the Association.

At this point, Mr. Dave Gaston, Jr. moved that a Committee be appointed to study the revision of the Rules of Procedure in appellate matters and to likewise consider the matter of Pre-Trial Conferences, and that this Committee make its recommendations to the Court and, in turn, make its recommendations to the Legislature. Mr. Graydon then moved, as an amendment to the motion, that the President of the S. C. Bar Association and the Dean of the Law School of the University of South Carolina be members of this Committee. This motion as amended was seconded by Mr. Frank P. McGowan and was duly carried.

The Report of the Law School Committee was then read by Mr. Frank B. Gary:

REPORT OF THE COMMITTEE ON THE LAW SCHOOL OF THE UNIVERSITY OF SOUTH CAROLINA

1. Three years ago, when the Committee of the South Carolina Bar Association on the Law School of the University of South Carolina became particularly active, the outstanding need for this school was that it should be adequately housed with facilities comparable to those needed by its every activity. It was apparent that the Law School could not develop so as to perform its proper function in the State unless the physical facilities needed were furnished to it. We are most happy to report that the Law School, on February 1, commenced its Spring semester in what is one of the finest law school buildings in America. The building is well constructed, most appropriately furnished, and its internal arrangement is peculiarly and suitably adapted to its needs. One large room on the second floor is set aside for the Editors and officials of the South Carolina Law Quarterly and for the use of the South Carolina Bar Association. Possibly the most striking feature of the building is the library, which occupies the whole of the third floor.

In the library of the Law School are to be found many modern texts, issues of some 40 Law Reviews, complete West System, such works as Federal Supplement, New York Supplement, State Reports prior to the West System, Decisions of Tax Courts, United States Court of Claims, Labor Law Regulations and Tax Law Regulations. Statutes and Codes of many of the States of the Union as well as standard Encyclopedias, sets of selected case reports, Annotated, such as A. L. R., etc. and selected case series in railroad law, corporation law, and other subjects. The members of the South Carolina Bar are welcome to use this library. Many members of the Bar from over the State already are availing themselves of this facility.

It may be of interest to know that John G. Hervey of the Oklahoma Bar, who is the traveling representative of the Section of the American Bar Association on Legal Education and who has visited many if not all the law schools in America, recently stated to Dean Boyer of Temple University in Philadelphia that the Law School Building of the University of South Carolina was the finest law school building he had ever seen.

2. Your Committee, working with President Graydon, has, during the last year, gathered together photographs of the past presidents of the Association and have had these separately framed and placed in the South Carolina Bar Association Room at the Law School and some in the main hall next to this room. We would call to the attention of the officers of the Association that this new building of the Law School is constructed of steel and concrete and is as near fireproof as almost any building you would find. It is a good place to keep prior records of the Association, and by so using this as such a depository, we run less risk of loss.

3. On April 15 the University dedicates the Law School building. This ceremony will be held on the campus in the open adjoining the building, or if the weather is uncomfortable, then in Drayton Hall, likewise on the campus. At these exercises we will be addressed by Senior Associate Justice E. L. Fishburne of our own Supreme Court. We all know our own Associate Justice Fishburne. Many of us know Chief Justice Arthur T. Vanderbilt, and for the benefit of those who do not know Mr. Vanderbilt, we would like to state that he is probably the most outstanding leader in our profession today and is a most gracious, interesting and effective speaker. The University is most fortunate in being able to have him participate in this program. Inspection of the building will take place from nine until ten-thirty o'clock a. m. on April 15, and the formal exercises will follow at ten-thirty o'clock.

The Richland County Bar Association is having a dinner in honor of the occasion on the evening of Friday, April 14. Members of this Association are eligible to attend and tickets may be obtained from J. E. Belser, Jr., Esq., Liberty Life Building, Columbia, South Carolina, by applying to him on or prior to April 10. The facilities are limited and when all the tickets available have been applied for, then there are no more. We urge the members of the Association to attend these exercises and as far as possible to attend the dinner.

4. We further report that James D. Evans, a graduate of the Law School of 1900, has recently presented to the Law School a fine

marble bust of Cicero. This bust was selected for Mr. Evans' family by the President of one of the Art Societies in Italy. It is placed just inside the library door under the portrait of the late Colonel Joseph Daniel Pope, the first Dean of the Law School. It was given in his honor and memory. Opposite this bust is the bust of the late Chancellor William Harper of our former Equity Court.

5. On March 24 and 25 the Law School entertained the Conference of Editors and Faculty Advisors of the Law Reviews in the South. There were some one hundred or more of these present from Law Schools ranging from Virginia to Texas. A splendid program was had. The Richland County Bar Association gave these visitors a Fish Fry at Heise's Pond, and the University of South Carolina entertained the visitors at dinner on the last evening of the meeting.

6. The South Carolina Law Quarterly is in a healthy condition and speaks for itself.

7. One project that the members of the South Carolina Bar Association are working on with the law faculty of the University is that of preparing four South Carolina Law books, one on Civil Procedure, one on Criminal Procedure, one on Pleadings and one on Forms. Those members of the Association who constitute this Committee are Judge L. D. Lide, J. Wilbur Hicks, Esq., Jesse W. Boyd, Esq., Robert M. Figg, Jr., Esq., John C. Bruton, Esq., P. Finley Henderson, Esq., Judge A. L. Hardee, Judge M. S. Whaley, T. M. Stubbs, Esq., and Dean Samuel L. Prince. The work of this Committee has just started, but they hope to have tangible results with works usable for texts in the Law School and of practical value to the profession.

Respectfully submitted,

FRANK B. GARY, *Chairman*
TOM STONEY
THOMAS H. POPE
CALHOUN THOMAS

The Report of the Committe on Grievances was then read by M. J. Means McFadden:

REPORT OF THE COMMITTEE ON GRIEVANCES

To the South Carolina Bar Association:

The Committee on Grievances respectfully reports to the South Carolina Bar Association that, during the past year, complaints in

two cases only have been referred to it, and in only one of these instances was it necessary to hold hearings of the evidence in support of the complaints and evidence refuting same. In that instance, however, a four-day hearing was held and very voluminous testimony was taken. The result of this hearing was a dismissal of the complaints.

The other complaint referred to the Committee was an attempt to use the Committee as a collection agency, undoubtedly, and the party preferring the alleged charges was advised to pursue such action as he might see fit, or be advised, to bring in the Courts of this State.

In conducting the hearing held, the Committee had to chart its own procedure and decide on the rules of evidence applicable and the sufficiency of the evidence adduced. The Committee decided that, in fairness to the respondent against whom the complaints were filed, the only proper rule to follow in passing upon the admissibility of evidence was to observe the rules which apply in the Courts of Common Pleas and General Sessions of our State; and this was done.

The Committee felt that the proceedings before it should not be public; and, consequently, although there is no statute so providing, all meetings of, and hearings before, the Committee were closed, and the Committee enforced strict secrecy so far as was in its power to do. In line with this thought of the Committee, it is recommended that there be no publicity whatsoever given to complaints made to the Committee or any investigations, hearings or other actions of the Committee, and that all such be kept secret unless and until it becomes proper and necessary to certify a record to the Supreme Court of this State. The Committee feels that it would be well to have a provision for this procedure incorporated in the applicable statute laws of this State.

The extended hearing held imposed a heavy burden upon Mr. Walter S. Monteith, the capable Executive Secretary-Treasurer of the State Bar Association, to provide places for holding the hearing, for taking the testimony and to preserve the testimony taken, and he discharged these duties in a most efficient, capable and willing manner. The Committee desires to publicly express its thanks and appreciation to him for the manner in which he handled a very difficult and trying situation.

Trust Funds: Past experience has indicated to the Committee that it cannot too strongly impress upon the members of the Bar of this State the importance and necessity of keeping trust funds coming into their hands deposited in banks in accounts separate and apart from

their own personal funds, and the further importance of applying such funds promptly to the trust of which they are a part.

Workmen's Compensation Cases: A number of complaints, without formal charges, about the administration of the Workmen's Compensation Act have been received by several members of the Committee. There has been no occasion to take any official action upon them. These complaints have been of the same nature as those covered and dealt with in the Report of the Grievance Committee made to the South Carolina Bar Association at its annual meeting in 1949. The views and recommendations set forth in that report are approved and again made by this Committee, with the hope that the evils complained of will be eliminated.

At this point, the meeting of the Association was adjourned and the Association was asked to immediately assemble according to Judicial Circuits and to appoint from each Circuit a member of the Nominating Committee for the nomination of new officers of the Association, and asked that each Circuit elect the local Circuit officers for the en-

At this point, the meeting of the Association was adjourned and the Association assembled in Circuit Meetings to accomplish the requests of the President.

SOUTH CAROLINA BAR ASSOCIATION MEETING

Held at the Cleveland Hotel, Spartanburg, S. C.

At 10:00 O'clock A. M.

March 31, 1950

The meeting was opened by the Honorable C. T. Graydon, President of the Association.

The report of the South Carolina Law Quarterly was made by Marshall T. Mays, student at the University of South Carolina, School of Law, and Editor-in-Chief of the South Carolina Law Quarterly. Mr. Mays reported that the financial condition of the Quarterly was good, thanks to the subscriptions of the members of this Association, paid for out of the dues of the Association. He stressed the importance of student participation in the publication of law reviews, as an aid to legal education. In addition, he invited members of the Association to contribute articles to the Quarterly, and expressed the appreciation of the Editorial Board for the splendid cooperation of the Association.

Following the Report from the S. C. Law Quarterly, the Floor then recognized Mr. C. W. Muldrow, Chairman of the Nominating Committee. Mr. Muldrow presented the following nomination of officers for the year 1950-51: President, Frank A. McLeod; Vice-President, Samuel R. Watt; Executive Committeeman, Huger Sinkler; Secretary-Treasurer, Walter S. Monteith.

Following the Report of the Nominating Committee, the Chair called for nominations from the Floor. There being none, Mr. D. W. Robinson, Jr. moved that the Report of the Nominating Committee be adopted by acclamation, and this motion was duly seconded by Mr. Sam Burts. This motion was unanimously passed and the foregoing officers were elected by acclamation by the Association.

Following the Report of the Nominating Committee, Professor Frank Wardlaw of the University of South Carolina presented the following paper on the subject "Capital Punishment":

THE STORY OF MOSES PEAK

By Frank H. Wardlaw

This is the story of Moses Peak, of Butler County, South Carolina.

His name was not actually Moses Peak — I have forgotten what it was — and there is no Butler County in South Carolina. But Moses Peak existed, all right enough, and the memory of the morning when he ceased to exist has haunted me for fifteen years.

You may classify the story of Moses Peak as fiction if that will be any comfort to you; certainly a sufficient number of details have been altered to make fiction the category in which, technically speaking, the story must be placed. It is actually a synthesis of several experiences rather than an unadorned account of one, and all of the names have been changed. But any resemblance which the characters and events depicted herein may bear to actual people and happenings in South Carolina is *not,* I assure you, merely coincidental. The story is true in essence if not in detail; I only wish that it were not.

During the four years which I spent in newspaper work in Columbia I covered some twelve electrocutions. The first such assignment was given to me at my request; I was, I suppose, prompted by morbid curiosity. It was not exciting as I had expected it to be, but loathsome and horrible, with a quality of unreality about it which made it seem fashioned of the stuff of which nightmares are made.

"You'll get used to it," the old-timers told me, but I never did. With each succeeding experience the horror was fresh and intensified. I would have begged off after the first electrocution, but I was afraid

of ridicule. Later I came to feel that I had a definite responsibility to tell the people of South Carolina what it was really like when, in their capacity as outraged society, they put one of their fellows to death. I have never seen a newspaper account of an electrocution which even approached the reality. Once — the morning that Moses Peak died — I came back to my desk in the grip of emotion and nausea and beat out a story which I thought came close to truth; it ended in the City Editor's waste basket.

"Write it again," he said, "when you have calmed down."

And so I have lived with the ghost of Moses Peak throughout the years.

Before proceeding with his story, however, I shall proceed to make several categorical statements of opinion which to me have assumed the proportions of deep convictions. They stem not only from the incident of Moses Peak but from many other contacts with the administration of justice in South Carolina during my experience as a reporter.

The late Murray duQ. Bonnoitt, for some years City Editor of The State, was wont to comment that "the trouble with electrocutions is that they always put the wrong people in the chair". He would then proceed to enumerate those of our citizens whom he considered particularly appropriate candidates. I could reproduce his list — at least in fragmentary form — but I have a feeling that it would be unwise.

With the above conclusion I am sure that many of you agree. But with the first of the categorical statements of opinion which I wish to make, I am equally certain that most of you will *dis*agree. It is merely a re-statement of the age-old high school debate query:

Capital punishment should be abolished.

I believe that capital punishment is morally wrong, that it is an indefensible relic of barbarism, that it is the negation of civilization. It should be outlawed by all peoples for all time.

In the first place, as it has been applied in this State, it is an inequitable form of punishment, existing almost exclusively for the poor and the friendless. Except in rare instances when public anger is particularly inflamed by an unusually brutal or spectacular crime, murderers don't go to the chair in South Carolina if they have either money or influential friends. During the eleven years from 1930 to 1940 inclusive, there were 2,958 homicides in the State — and sixty-seven electrocutions! Capital punishment exists in South Carolina for the Moses Peaks, but not for their more fortunate brethren.

Capital punishment has no place in a Christian civilization. Christendom has always sought ways to get around the starkly unqualified words of the Sixth Commandment, "Thou shalt not kill". For example, the Shorter Catechism, based on the Westminster Confession of Faith, asks the question (No. 69) "What is forbidden in the Sixth Commandment?" and answers: "The Sixth Commandment forbiddeth the taking away of our own life or the life of our neighbor *unjustly* . . ." The italics are mine. Of course, that isn't what the Commandment says at all. The words are simply "Thou shalt not kill". But men have considered obedience to this commandment to be impractical and have always added their individual and collective qualifications.

The truth of the matter is that the sacredness of the individual human life — and that means *every* life — is the very basis of democracy, of Christianity, and of all truly ennobling and civilizing concepts which have come into the world. We cannot make exceptions in the application of this principle. Mankind has not yet learned to peer deeply enough and unerringly enough into the human mind to separate with anything approaching accuracy those who are deserving of death from those who are not. We must leave some things to God.

Granted that society, for its own protection, must make men answer for their conduct, must indeed shut some away where they can do no more harm. But society has no more right to take a human life than has an individual. The idea of the State of South Carolina, for whose every corporate action — Lord save us — we must assume our share of responsibility; the idea of the State strapping some poor wretch in the chair and burning the sacred life from his body is particularly repugnant to me. Too often the guilt of the society which throws the first — and the last — stone is as great as his. Too often his course from the squalid cradle of his birth to the electric chair has been all but inevitable, the product of the environmental forces which have acted upon him coupled with the failure of our social institutions to do anything when he was a child to give him a real chance.

There's something degradingly barbaric about the whole procedure. The people who gather to see the event tell themselves that they have come to see justice done, but what they actually want, stripped bare of all pretense, is to see death done.

But now for the second categorical statement which I wish to make:

For every man accused of crime there should be available the services of a public defender, an able lawyer on the payroll of the State, whose duty it is to see to it that the defendant gets a fair trial.

Our present system, whereby the trial judge appoints at random some member or members of the Bar to defend persons who cannot hire their own lawyers, does not always result in adequate defense. Too often the lawyer so appointed is inept, inexperienced, or just plain uninterested. Too often he merely goes through the motions.

Now I realize full well that most men and women whose cases come to trial are guilty of the offense with which they are charged; law enforcement officials do not, as a rule, make up cases against people whom they believe to be innocent. But not all people who are tried are guilty, and even the most culpable is entitled to an effective presentation of his case. If, however, he doesn't have money, or friends who can raise it, the defendant cannot be sure of having an adequate defense at all.

There have been, of course, many instances where members of the Bar have performed magnificently in behalf of men whom they were appointed to defend. Just this year two South Carolina lawyers fought a case all the way up to the United States Supreme Court and won the freedom of a Negro whose case was dumped in their lap by the court; they had become convinced of the man's innocence and simply saw the case through.

But such zeal is rare. When a prisoner stands before the bar of justice he should be able to count on his lawyer to fight for him, all the way if need be; but it doesn't always work out that way.

And here's another point which may not have occurred to you: It's a good thing that most defendants in criminal cases are guilty, for the cards are stacked against them. The investigating officers and the prosecuting attorney tend to form a tight little team which may have conviction rather than justice as its goal. From the outset they control the physical evidence in the case and, to a considerable extent, the witnesses. Once the police have decided that a suspect is guilty, human nature takes over and they usually begin to look only for such evidence as will build up the case against him. The prosecutor to whom the indictment is handed by the grand jury assumes from the start that the defendant is guilty; he is quite likely to ignore or dismiss as immaterial any evidence which does not fit into his theory of the case. Solicitors run for reelection on their record of convictions, not their devotion to abstract concepts of justice.

Yes, the innocent defendant in a criminal case is in a precarious position indeed, even with the best of lawyers; without able counsel, his case is well nigh hopeless.

Ever since I covered courts I have been completely convinced that the State should make available to defendants the services of a pub-

lic defender whose duty it is to fight just as hard for the acquittal of the accused as the prosecution fights for his conviction. Our present system is too undependable when human lives and individual liberty are at stake.

Even if public defenders are not provided for all persons accused of crime, there are certain other safeguards which should be set up to prevent miscarriages of justice in capital cases.

Several states have laws requiring that all cases in which the sentence of death has been pronounced be reviewed by some appellate court. Compulsory review of death cases by our State Supreme Court would seem to me to be an eminently proper procedure.

Of course, in such review the defendant would have to be given a capable appellate lawyer who could present his case properly, something which few lawyers appointed by the court under our present system have the time, the money, or the experience to do. A somewhat similar procedure has long been followed in our Federal courts.

I should like to suggest, rather tentatively, one additional safeguard — the more liberal use by judges of change of venue and continuances in capital cases. If society is determined to play God and inflict the death penalty, it should do so calmly and judicially, and not in the midst of inflamed public opinion. I know that it is customary to decry the delays of court procedure, but the hand of justice should not be driven by passion when a human life lies in the balance.

And now for my final major point:

Improvement of the quality of the personnel of our law enforcement, judicial, and penal institutions and agencies would be a contribution of truly great importance to better race relations in South Carolina.

Most Negroes have a pitifully fatalistic attitude toward "the Law" and all of its works. It is born partially of the brutality with which they are still too often dealt, and the almost universal failure of policemen, constables, and the like to recognize their innate human dignity.

Here is an authentic bit of Columbia folklore, a mournful ballad which goes something like this:

> Goin' down Sumter and comin' up Main,
> Policeman ax me what my name.
> I sez to him dat I ain't know,
> He sez to me "to de jail you go".

Down in the jailhouse on my knees
De first thing I seen was a big pot o' peas;
De peas wuz cold and de meat was fat—
"Do, Mr. Cramer, I can't eat that"!

Among the darkling memories which haunt my mind are the pictures of the faces of many Negroes in the toils of the law, most of them guilty, some innocent—all dumb as the sheep before the shearers, awaiting their fate at the hands of the master race. Until Negroes in general feel that they have the equal protection of the law, until they can expect scrupulously fair treatment from us not only on the highest but on the lowest levels, until they come to regard "the law" as something which protects them rather than as a malignant force arrayed against them; until that day comes they labor at least partially in vain who seek to promote better feeling and understanding between the races.

Now I do not mean to imply that Negroes are mistreated simply, or even principally, because of their race. Every statement which I have made about them applies with almost equal force to underprivileged white people. Poverty and ignorance and lack of influence usually are the determining factors rather than race. The overwhelming majority of Southern whites sincerely want complete justice for Negroes. Only among the lowest classes of white people does hatred of the Negro really exist, which is one reason why it is so important to fill all law enforcement jobs with the better type of men.

The extent to which local autonomy is carried in the enforcement of laws in South Carolina makes it difficult indeed to deal constructively with the problem of placing men of high character and human understanding in such positions throughout the State. But it is a problem which must be faced.

Is it impractical to wish for a politics-free state police force and a genuine civil service set-up for all law enforcement agencies and penal and correctional institutions?

I have often thought that we have a much better judiciary in South Carolina than we are actually entitled to. Many decades have passed since any breath of scandal has touched a South Carolina judge. And among these judges have been many men of genuine ability. But the practice of the General Assembly in recent years of electing only its own members to the bench will, if it is continued, almost inevitably result in placing political prowess above character and legal ability as a basis of selection. This policy should be changed. Justice is too precious a commodity for us to run the risk of its ever being entrusted to politically minded men of only moderate capacity.

The high quality of South Carolina's judiciary has been our salvation in the past. Will it continue to be?

I am tempted to continue indefinitely on this theme, but I must get on with the story of Moses Peak after first offering apologies for stating my conclusions in my introduction. I am telling you this story because I think that the general points which I have attempted to make will come into clearer focus if they are translated into terms of a specific individual.

One word of caution, for I am fearful of being misinterpreted on this point. Miscarriages of justice are, I think, quite rare in South Carolina. The story of Moses Peak is admittedly far from being typical. But it *has* happened here, and it can happen again unless steps are taken to prevent its recurrence.

The story of Moses Peak was also, of course, the story of Jess Hardy.

* * * * * *

I knew very little about either of them until the morning I went to see them die.

Before, they had merely been names in the newspaper to me — not even front page names.

As I waited on the corner at 4:30 a. m. for Doc Peters, the penitentiary chaplain, to pick me up, I reviewed briefly in my mind what I had read about the crime for which they were to die.

Martin Smith, an aged country store-keeper in the southeastern section of Butler County, was found dead behind the counter of his store. His skull was crushed. A bloody pick handle lay beside him. His right hand clutched a handful of ten-penny nails from the bin beneath the counter. Obviously, he had stooped over to get the nails from the bin beneath the counter. Obviously, he had stooped over to get the nails for a supposed customer, who had then grabbed the pick handle from a nearby rack and struck.

The cash drawer was empty. Cigarettes, shot-gun shells and other merchandise were missing.

Two days later, rural policemen arrested Jess Hardy, a Negro, and charged him with the murder. Quantities of the stolen merchandise were discovered in his cabin. His fingerprints checked with those on the pick handle.

Jess Hardy's confession would have been an unnecessary formality if he had not implicated another Negro in the slaying, one Moses Peak. Twenty-odd dollars in cash and a good supply of shot-gun shells of the same brand as those which had been stolen were found

under the bed in the shack on the edge of the swamp where Peak lived alone, quite sufficient evidence to substantiate Hardy's charge that Peak took part in the killing.

Moses Peak denied steadfastly any connection with the crime. He said that he had purchased the shells and had hidden them and the money as an ordinary precaution, since there was no lock on his door. He was unable to produce any sort of alibi, declaring that he had been alone in the swamp at the time of the killing.

The trial also was a formality. The lawyers who were appointed by the court to defend the two Negroes did little except to bring forward as character witnesses for Peak several prominent white men for whom he had frequently acted as a hunting guide. No character witnesses were introduced for Hardy, who had served several terms on the gang and evidently had the reputation of being a "bad nigger".

Both defendants were convicted and sentenced to die in the electric chair, which was why I was standing on the street corner waiting for Doc Peters.

I always went down an hour or so before an electrocution with the chaplain. Most electrocutions were pretty routine assignments, but, by spending the last hour with the condemned man, I had on several occasions been able to pick up good human interest angles.

A light rain was falling, blurring the harshness of the street lamp. The March coldness was damp and penetrating, and I pulled my topcoat tightly about me.

The minister's Ford drew up to the curb and I climbed in beside him.

Doc Peters had been penitentiary chaplain for many years and had wrestled interminable hours for the souls of men condemned to die. Some folks didn't like him, but he was a good man for his job, in my opinion. Frequently, I knew, he had been able at least to lighten the "horror of the shade" a little for the poor devils whom it was about to encompass.

He had never been blessed with an upper-class pastorate, but had lived all his life with humble people, sharing their burdens and walking with them through the valley of the shadow, as a good shepherd should.

This morning he was worried, plainly.

"What's on your mind, Doc?" I asked.

"I don't like this business this morning," he answered abruptly. "I can't give you any evidence to support my statement, but one of those darkies, Moses Peak, is innocent; I am convinced of it."

"What makes you so sure?"

"He's a good nigger," Doc Peters responded. "I know as much about niggers as anybody, and I know that. He's a swamp nigger — spent most of his time hunting and fishing. He never was in trouble before, except once for shooting rabbits out of season. He just isn't the type to go in with another man and kill a storekeeper for his money.

"I know niggers, and I know when they're lying," Doc Peters continued. "This one isn't. He's a God-fearing little fellow, and as straight as a string. He knows he's going to die, and niggers just don't lie when they know they're going to die."

"Why don't you see the governor about him?" I asked.

"I have." His lips were a hard, straight line. "But I had nothing definite on which he could act. Besides, the dead man had a whopping big family, and their political connections are good. The senator has already told the governor that they won't stand for any dilly-dallying around about *this* electrocution. The niggers will die, all right. Both of them."

The forbidding walls of the penitentiary loomed darkly ahead and the conversation broke off suddenly.

We entered the main office of the pen and submitted to a perfunctory search before two guards escorted us out of the building into the inner compound.

Lights streaked through the rain from the grim buildings around us, darker blots against the dark night; the prison day was beginning. Soon those lights would flicker dimly and every man within the walls would know what that meant and would curse silently to himself — or pray.

The guards led us across the compound to a squat brick building where death waited.

Two sets of doors were unlocked and then locked again behind us, and we were in the room where the death chair stood. It was a little room — too little — with one small, heavily-barred window under the ceiling. The walls were gray and streaked. Through another door, and we were in the corridor which ran in front of the four death cells, two of them empty, two of them occupied.

We stopped in front of the first cell. A lean, tan Negro, his head shaven, lay on the iron cot. He gazed woodenly at us.

"Jess Hardy," Doc Peters called. "There's only another hour. Don't you want to get right with God?"

"That's between me and Him," the Negro mumbled.

"Just as you say," the minister's voice was low. "But remember that I'll be here if you want me."

Jess Hardy turned his face to the wall.

The second cell was empty. In the third, Moses Peak waited for six o'clock to come. He was sitting quietly on the edge of his cot, a puzzled frown on his open black face. He came forward eagerly and shook Doc Peter's hand, then mine.

"I done held my Bible in my hand all night, Reverend," he said. "I sho' wish I could read it."

"Do you want me to read to you now, Boy?" Doc asked.

"Yassah! Read dat part 'bout 'In my Fadder's house is many mansions'."

The minister took the outstretched Bible between the steel bars, opened it and read slowly. I knew he could not see the pages, but the familiar words glowed as he uttered them.

I glanced once at the face of the little darky as he listened to the message of comfort and hope . . . and glanced away again.

"I go to prepare a place for you, and when I come again I will receive you unto Myself, that where I am, there ye may be also . . ."

"We'll all be white den, won't we Reverend?"

"Yes, Boy; we'll all be white then!"

"Reverend?"

"Yes?"

"I'se innocent, Reverend. I never had nothin' to do wid killin' dat old man."

"I know it, Boy. He was innocent, too, when they crucified *Him.*"

"That sho' is a comfort, Reverend. Hit sho'ly is."

For a long moment there was silence.

"Reverend?"

"Yes, Boy?"

"Reverend, what dey goin' to do wid me atter dey 'lectrocute me?"

"They've got a graveyard here, down by the river."

"Reverend, dere's a little Babtist church on de edge of de swamp, down to home. Hit's Ebenezer church. Don't you reckon I could go back dere? I sho' would like to be dere."

"I promise you, Boy; I'll take you there."

"I sho' hates to bother you, Reverend, but hit would be a comfort to me . . ."

Moses Peak paused, and for a moment was far away.

"De deer run through dat grabeyard all de time," he said softly.

The iron door clanged open, then shut again, and the captain of the penitentiary guard, a burly, red-faced man, was with us. He called for the attention of both condemned men, and read the formal orders for their death, as required by law.

". . . And may God have mercy on your soul."

The way he read it sounded as if he dared God to be so stupid as to have mercy.

When the captain went back into the room where the death chair stood, I went with him.

The crowd had already gathered for the big event.

The little room was filled to its dirty gray walls. Present as the genial host was the superintendent of the penitentiary, a man who had qualified for the position by a lifetime spent in minor political jobs.

He pointed out some of the celebrities in the crowd. There was the slain man's wife, thin, tight-lipped, unsmiling. There were his six brothers (the smallest weighed about 240, I judged). There were the sheriff of Butler County, two deputies, and two rural policemen. Huddled fearfully in the far corner were two Negroes. They always brought a couple of darkies who knew the condemned man so that they could go back home and spread the word that he had really died and not just been spirited away.

The Butler County delegation was in holiday mood. Corn whiskey vied with perspiration for control of what little air there was in the room. The brothers joked heavily with the sheriff and his deputies.

"I want some barbecued nigger!" one of them quipped, which brought a full round of laughter.

At a word from the superintendent, a guard unlocked the door to the death cells and entered, accompanied by another guard. When they returned, Jess Hardy was between them. He looked at the floor, shuffled toward the chair as they guided him.

Jess Hardy sat in the chair and they strapped him securely in, attaching an electrical connection to one leg. Just before they pulled the cap of death down over his head, the superintendent stepped forward.

"Jess Hardy," he called. "Is there anything you want to say?"

"No," he whispered hoarsely.

The superintendent signalled to the guard, who started to adjust the cap, but the Negro called out, "Stop!"

"I do want to say something." The words tumbled from his lips; we had to strain to follow them.

"Moses Peak is innocent. I done it by myself. I lied on him because he had stole my woman. I can't face my Jesus with no lie on my lips."

"Is that all?"

"That's all."

"God forgive you, Boy," Doc Peters called, as the guard adjusted the cap.

The superintendent raised his hand and the state electrician pulled the switch. Jess Hardy's feet slapped the floorboard as two thousand volts coursed through his body.

The lights flickered dimly. There was a steady hum in the air. Smoke arose from the chair, smoke and the overpowering odor of burning flesh.

In a moment it was all over. The doctor placed his stethoscope to Jess Hardy's seared chest and pronounced him dead. Guards unstrapped him from the chair and laid him on a table in the anteroom.

They opened the outside doors and fresh air found its way in, but not enough.

Doc Peters was speaking to the superintendent.

"You're not going through with it now, are you?" he demanded.

The superintendent spread out his hands in a gesture of helplessness.

"What can I do? The governor told me yesterday that he positively was not going to interfere with this execution no matter what; I can't stop it just because that nigger changed his story."

The Butler County contingent got wind of what was going on and immediately voiced loud demands that the program proceed as advertised.

"That dirty murderer was lying," one of them summed up their sentiments. "He thought he'd change his story and you wouldn't electrocute him either. We won't stand for no fooling around."

For several minutes the argument waxed hot; then Doc Peters saw that he was licked. He had known that he would be.

The outside doors were closed once more and the guards brought in Moses Peak. His broad black face was troubled, but he walked with dignity.

His voice was low and steady when he spoke.

"I'se innocent," he said. "Gawd knows I is. I ain't neber harm' a hair of dat ole man's haid."

One of the men behind me sneered, "the lying bastard."

"Is there anything else you want to say?" the superintendent asked.

"Yassah!" the little Negro said. "I forgives everybody. I don't know how come Jess Hardy lie lak dat 'bout me, but I forgives him and I prays to Gawd to save his soul. I asks Gawd to forgive me all the meanness I done done. But I ain't never harm' dat ole man."

"God be with you, Boy!" Doc Peters said.

The superintendent raised his hand.

The lights flickered dimly in the room . . .

Following this presentation, Mr. Sam Latimer moved that the paper of Professor Wardlaw be published in toto in the records of the Association. This motion was duly seconded and passed.

The Secretary then read the Report of the Memorial Committee: (Memorials to the deceased members will be found in this issue and subsequent issues.)

REPORT OF MEMORIALS COMMITTEE

Memorials to deceased South Carolina Lawyers announced at 1949 State Bar Meeting were prepared by the lawyers selected to write such and all were duly published in The South Carolina Law Quarterly.

The list of the seventeen South Carolina lawyers who have passed on since the 1949 meeting, with names of those writing memorials, follows:

P.D. Barron, Union, by J. Frost Walker, Sr. and J. Raymond Flynn.
E. J. Best, Columbia, by Edwin H. Cooper.
George Edwin Dargan, Darlington, by Jerome F. Pate.
William Egleston, Hartsville, by John F. Wilmeth.
James H. Fowles, Columbia, by N. Heyward Clarkson, Jr.
Halcott P. Green, formerly of Columbia, by W. Gordon Belser.
David W. Galloway, Spartanburg, by Sam N. Burts.
John C. Lanham, Spartanburg, by Harry DePass, Jr.
Leroy Lee, Kingstree, by M. A. Shuler.
Clarke W. McCants, Sr., Columbia, by Charles B. Elliott.
Williams B. Martin, Orangeburg, by P. F. Haigler.
Henry K. Osborne, Spartanburg, by Thomas B. Butler.
Jennings K. Owens, Bennettsville, by William C. Goldberg.
Lewis W. Perrin, Spartanburg, by Horace L. Bomar.
Jesse L. Sherard, Anderson, by John K. Hood.
Tyrone C. Sturkie, Lexington, by T. C. Callison.
A. E. Tinsley, Spartanburg, by Jesse W. Boyd.

We record these names with sadness, realizing the loss to our Bar and to our State, but also with pride in the lives of service rendered by these South Carolina lawyers.

F. Wm. Cappelmann, *Chairman*
S. Henry Edmunds
Moffatt G. McDonald
Clement F. Haynsworth, Jr.
Raymond B. Hildebrand
Alfred F. Woods

Mr. Coleman Karesh, Professor of Law at the University of South Carolina, next presented the Report of the Committee on Jurisprudence and Law Reform:

REPORT OF COMMITTEE ON JURISPRUDENCE AND LAW REFORM

To The South Carolina Bar Association:

Your Committee on Jurisprudence and Law Reform begs to report as follows:

Your Committee, in observing the needs in the field of substantive law — with which type of law it is principally concerned — does not find that there are any specific matters of a pressing nature that warrant the attention of the Association. Since the Committee does not concern itself with laws growing out of social, economic or political needs, or matters of general public policy, its consideration is necessarily limited to those matters with which the average lawyer is confronted in his practice. The major developments in the law are to be found in its procedural and administrative aspects, and these are the responsibility of other Committees.

The Committee, in making these observations, is not deprecating its own importance, but pointing mainly to the relative unimportance of its functions. Nevertheless, there is a duty resting upon this Committee — and upon the Bar — organized and unorganized, as a whole, for that matter — to be aware constantly of the overall requirement for a body of rational, sensible, and consistent law. In the area of statutory law this requirement is paramount. Statutory law, as the studied expression of legislative — and therefore public — intent, should be inherently sound, capable of being understood, and harmonious and consistent within itself and, to an extent, with non-statutory law. Perfection, of course, can never be reached in any field of law, statutory or case law, but there is always the charge of attempting to attain it, and always the duty of scrutiny and observation.

The members of your Committee do not have the time, talent, energy or inclination to pursue the monumental task of close scrutiny, minute analysis and severe appraisal of the vast body of statutory law, with the view of ordering a cohesive, coherent and symmetrical system. That task is better left to public officers charged by law with the responsibility of constant and continuous survey, in a position to give official opinion and advice. Nevertheless, the members of your Committee, in their experience, have become aware of some statutory

items that they believe warrant the consideration of the Bar, and they submit them to the Association for its study. Because of the limitations of time confronting the Association in its meetings, the Committee will not present at those meetings the rather detailed comment that each of these items entails. Rather, it submits them merely as items for study by individual members of the Bar, in the prime hope that they will produce some serious thinking and, perhaps, evoke in one or more legislator-lawyers a response that will manifest itself in appropriate curative legislation.

The subjects which this Committee feels worthy of being called to the Bar's attention are:

I. INTESTACY: ADVANCEMENTS.
II. PROOF OF LOST WILLS.
III. CLAIMS AGAINST DECEDENTS' ESTATES.
IV. MINORS' CONTRACTS.
V. GIFTS TO ILLEGITIMATES; ADOPTION OF ILLEGITIMATES.

The Committee appends to this report the material dealing with the above topics. It does not recommend that the suggestions or comments made in them be adopted. It recommends merely that the whole material be received as information, and it expresses the earnest hope that the matters there discussed be studied and appraised.

Respectfully submitted,

Committee on Jurisprudence and Law Reform

COLEMAN KARESH, *Chairman*
FRANKLIN G. BURROUGHS
WM. H. GRIMBALL, JR.
C. F. HAYNSWORTH, JR.
WM. D. TINSLEY

ADVANCEMENTS

The doctrine of advancements is embodied in Sec. 8909 of the Code of Laws of 1942, and is in reality a suffix to the Statute of Descent and Distribution — Secs. 8905, 8906. Its opening words are "Nothing herein contained —", a reference to the Statute of Descent and Distribution, and the text of the advancements statute and the decisions interpreting it indicate clearly that the Statute of Descent and Distribution must operate with, and be qualified by, the law of advancements.

The doctrine of advancements is, of course, an old and familiar one; it is virtually a right given to children who have not been the recipients of gifts, or who are recipients of lesser gifts, from a parent, to insist that children who have been advanced shall bring their gifts into "hotchpot" as a condition to the latters' participation in the parent's estate. The right may be waived — *Murrell v. Murrell,* 2 Strobhart's Equity 148; *Miley v. Deer,* 93 S. C. 66, 76 S. E. 27; and, accordingly, where a distribution or settlement has been made by the children or descendants of an intestate, without an insistence that gifts made by the intestate parent during his lifetime be brought into "hotchpot", the settlement is binding, in the absence of fraud, concealment, or mistake of fact. It is, perhaps, the fact that waiver takes place in most cases that accounts for the paucity of reported litigation on the subject of advancements in recent years. Yet, waiver or not, the doctrine is there, available for use.

The doctrine itself is a sound one. It is based upon the presumption that a parent, in the distribution of his intestate estate, intends equality among his children, and for that purpose what he has given during his lifetime to his children is grouped together with what he actually leaves on death, the whole to be treated as the "pot" or "pool" which is to form the basis of distribution. The power of the legislature to insist upon this division is undisputed, as a consequence of the accepted notion that inheritance is not one of inherent right but of legislative grace, and that it can be limited and made the subject of such qualifications and conditions as the legislature may impose. *Fuller v. State Tax Commission,* 128 S. C. 14, 121 S. E. 478.

Since the rule of advancements exists in practically every state, and since it is intrinsically sound and just, there is no reason to eliminate it. But there are at least two points of extreme divergence in South Carolina from the law as generally applied that make it desirable to consider changes in our local law to conform with the rule uniformly followed elsewhere.

The first instance of conflict with the general rule is that concerning the parent's intention in making the gift. The prevailing rule — in fact, everywhere followed, apparently, except in South Carolina — is that the parent's intention in making the gift is determinative of whether the gift is to be treated as an outright, absolute gift, or, on the other hand, is to be treated as an advancement. If he intends it as an absolute gift, the heirs other than the donees cannot insist that it be brought into "hotchpot". In this state, however, intention plays no part, and it is not the intention of the donating parent that controls but the character of the gift itself. For the general rule, see annota-

tion in 26 A. L. R. 1086. The South Carolina proposition is thus stated in *Rees v. Rees,* 11 Richardson's Equity 86:

> "What is or is not an advancement may depend on circumstances . . . but mere declarations of the donor cannot alter the operation of law either as to the character of the gift, or even the mode of valuation."

The case goes on to illustrate:

> "A father may give his son half his estate and declare by the most formal instrument that he does not intend it as an advancement, but if he afterwards dies intestate the law precludes the child from any share in the inheritance, unless he bring such previous gift into hotchpot."

In conformity with the stated rule against the intention of the donor are: *Rickenbacker v. Zimmerman,* 10 S. C. 110, and *Heyward v. Middleton,* 65 S. C. 493, 43 S. E. 596.

In view of the isolation of the South Carolina rule, the soundness and justice of the rule should be inquired into. Judicial interpretation cannot now, of course, change it, but if the majority rule is wiser, the legislature should be addressed with a view of bringing the local rule into line.

The second point of disagreement between the South Carolina principle and that enunciated elsewhere is the mode of valuation of the gift. In practically every jurisdiction the valuation of the gift that is to be brought into "hotchpot" is determined as of the time of the making of the gift. In some cases, the rule is qualified by the further rule that if the gift is to take effect with respect to enjoyment not when it is made, but at some future date, the valuation is made as of the latter date. See annotation 26 A. L. R. 1178.

In South Carolina, the valuation is made as of the time of death, but with the important qualification that relation must be had to the condition of the gift at the time it was made. Thus, strictly speaking, valuation is not determined as of the time of death, but the gift must be viewed both at the time of death and at the time of the making of the gift. In *Wilson v. Kelly,* 21 S. C. 535, the test is simply stated: "The rule is, in ascertaining the amount at which an advancement should be charged, to inquire into what is the value of the property at the time of the death of the intestate; what it would then bring, assuming it to be in the condition in which it was at the time of the gift." The statute itself — Sec. 8909 — states the standard substantially, as follows: "the value of which portion being esti-

mated at the death of the ancestor, but so as that neither the improvements of the real estate by such child or children, nor the increase of the personal property, shall be taken into the computation".

In mose cases the valuation is easily established. In the case of a gift of money, the determination is simple, since the yardstick is the money itself, without regard to purchasing power. The rule, with its double point of inquiry, is best illustrated by the old, and interesting, case of *McCaw v. Blewit,* 2 McCord's Equity 90, where the court uses this example:

> "Thus, a father gives to one of his sons a healthy negro boy of twelve years of age, and ten years after the gift the father dies. If the boy be brought into hotchpot, his value will be estimated as that of a boy twelve years old; and whatever such a boy would then bring, the child is to be charged with an advancement."

It is to be noted that the value of the 12-year old slave for purposes of "hotchpot" would not be the value of that boy when he was given to the donor's child, nor the value of that particular boy, then 22 years old, when the parent died, but the value of such a boy, aged 12, when the intestate died.

Applying the rule in this fashion, the courts held that, where a parent who had made gifts of slaves to children before the abolition of slavery died after abolition, the children advanced did not have to bring the slaves into hotchpot, because although the slaves may have had value at the time the gifts were made, and although the children may have had the use of them, the valuation had to be at the time of death, and since a slave at the time of death following abolition of slavery had no value, the valuation was nil. *McLure v. Steele,* 14 Richardson's Equity 105; *Hughey v. Eichelberger,* 11 S. C. 36; *Ex Parte Glenn,* 20 S. C. 64; *Wilson v. Kelly, supra; Manning v. Manning,* 12 Richardson's Equity 410.

Another example of the dual-character valuation is to be seen in *Rickenbacker v. Zimmerman, supra,* in which the question was whether a child whose father had taken out a policy of life insurance on his life with the child as beneficiary should be charged as advanced with the face amount, plus accretions, of the policy. The finding in the court below was that, since valuation must be had as of the time of death, the child, having collected the face amount of the policy and accretions, was to be charged therewith; but the Supreme Court reversed, declaring that the inquiry into the condition of the gift at the time that it was made should have not been overlooked, and it held

that the question would be what a policy of insurance, on the life of a person with a similar life expectancy "and of the same age as the father * * * was when this policy was issued be worth * * * on the date of intestate's death". It was this valuation, plus premiums subsequent to the initial premium, which the Court held was to control, although it does not appear in the case just how a hypothetical policy, issued at a later date but reflecting conditions existing at an ealier time, could accurately be valued, unless it be thought of in terms of surrender value.

Cases may readily be imagined in which the formula may become difficult or impossible of application. A father, let us say, gives a son a vacant lot in 1930. The lot is in an undeveloped area and at the time of the gift is worth $1,000.00. In 1950, when the father dies, the area has become highly developed and the same lot has become worth $5,000.00. The valuation is not $1,000.00 nor is it $5,000.-00. The question would be: what would a vacant lot in an undeveloped area, with perhaps similar potentialities for development, be worth in 1950? Actually, this may not be the true test, and the lack of easy analogy places the formula in a hard-to-handle position. Or, for another example: a father, in 1920, gives his son a block of stock in A corporation worth at the time $1,000.00. The corporation goes out of existence in 1949, and the stock becomes worthless. The father dies in 1950. Neither $1,000.00 nor zero is the valuation. But what is it? To arrive at a counclusion under the rule would necessitate the duplication of the character of the gift at the later date — the date of death. The question would probably take the form of asking what a block of stock in a similar corporation, with similar capital structure, dividend record, business history and future, and so on would have in 1950. It is submitted that the speculative character of the inquiry would negative any reduction to value in terms of money, which is the indispensable requisite for valuation. If it be argued that the worthlessness of the corporation makes the valuation zero, since the shares of stock in 1950 are actually worth nothing, the answer is that, if the subject of the gift had been an automobile which had been thereafter destroyed by fire, the donee would nevertheless be charged; although, again, how one would value an automobile under the two-angle principle is hard to say.

The cumbersome and difficult standard of valuation employed in this state ought to be re-appraised. There is nothing intrinsically of fundamentally just or commendable in the use of such a clumsy measure. A more usable and sensible formula might well be adopted. The formula adopted in the Model Probate Code — Sec. 29 — is

worth considering: "The advancement shall be considered as of its value at the time when the advancee came into possession or enjoyment or at the time of the death of the intestate, whichever first occurs."

Proof of Lost Wills

Until the recent case of *Davis v. Davis,* 214 S. C. 247, 52 S. E. (2) 192 (1949), no case had clearly marked out, or concerned itself directly with, the proof of wills lost or accidentally destroyed. There have been several cases in which the issue was whether a will which could not be produced had been revoked by destruction, or had simply been lost or accidentally destroyed; but none of them dealt specifically with the mode of proving a lost or accidentally destroyed will. The cases confined themselves in the main to an inquiry into the facts surrounding the non-availability of the will. No mention is made in the cases of the procedure of proof, and the practice seems to have varied, as a brief analysis will show. There is only one statute which deals with lost wills, and that does not describe the mode of proving lost wills, but deals merely with the grant of letters of administration pending the finding and filing of a will alleged to have been lost. Sec. 8978, S. C. Code of Laws of 1942.

It is elemental that a lost or accidentally destroyed will, or for that matter a will destroyed out of the presence of the testator, or destroyed without the intent to revoke, or fraudulently suppressed, may be proved. The contents of the will may be proved by secondary evidence, which must be clear, and there is no requirement as to the number of witnesses necessary to show contents. One witness for that purpose has been held sufficient. *Bauskett v. Keitt,* 22 S. C. 187. However, the proponent of a lost will, or, generally, one which cannot be produced, is confronted with the presumption that where a will known to have been in existence and to have been in the testator's possession, or to which the testator had ready access, cannot be found, the testator destroyed it *animo revocandi.* To establish the will, the proponent, in addition to showing its contents, must overcome the presumption. *Reeves v. Booth,* 2 Mills Const. 334; *Legare v. Ashe,* 1 Bay 464; *Durant v. Ashmore,* 2 Richardson's Law 184; *Watkins v. Watkins,* 13 Richardson's Law 66; *Bauskett v. Keitt, supra; Buchanan v. Anderson,* 70 S. C. 454, 50 S. E. 12; *Kollock v. Williams,* 131 S. C. 352, 127 S. E. 444; *McLaurin v. Newton,* 183 S. C. 379, 191 S. E. 59; *Lowe v. Fickling,* 207 S. C. 442, 36 S. E. (2) 293; *Davis v. Davis, supra.*

In the cases just cited, the proceedings to establish the allegedly lost will were variously brought. In *Reeves v. Booth,* the will was one of realty and was sought to be proved in an action for partition, at a time when wills of realty were not probated in the Court of Ordinary but were proved as muniments of title. In *Legare v. Ashe,* the case states that the proceeding was the trial by jury of an issue submitted by the court of equity, the will in suit being one of realty and personalty. In *Durant v. Ashmore,* the case was tried below on an appeal from the Ordinary, but it does not appear whether the Ordinary had initially admitted the lost will in common form or in solemn form. In *Watkins v. Watkins,* the appeal in the Circuit Court was likewise from the Ordinary, but, again, it does not appear whether the proceedings in the Court of Ordinary were instituted in common or solemn form. In *Bauskett v. Keitt,* the appeal was from the Probate Court, but it appears that the proceedings were instituted in the first instance in solemn form before the Judge of Probate. In *Buchanan v. Anderson,* the proceeding to establish the alleged lost will was brought in Equity. In *Kollock v. Williams,* a first will which had been revoked by a second will, which could not be found, was proved in common form, and in the contest upon the first will the issue of whether the second will had been destroyed *animo revocandi* was raised. In *McLaurin v. Newton,* the action was in the Court of Common Pleas to construe a will and codicils, and a lost codicil was proved in that action. In *Lowe v. Fickling,* the action was originally instituted in the Court of Common Pleas to establish an allegedly lost will.

In the *Davis* case, a Judge of Probate admitted to probate *in common form* a will which had allegedly been accidentally destroyed by fire, upon the production of an affidavit of contents and a petition of the proponent showing the making of the will and the accidental destruction of the instrument. The affidavit was made by the scrivener of the will, who was one of the subscribing witnesses. The affidavit contained a statement that the deponent, together with two other witnesses whose identities he did not recall, witnessed the will. The action was brought in the Court of Common Pleas by the heirs of the decedent (who, other than the wife, were not named in the will) for partition. The Lower Court entertained the action in the face of a contention that the Probate proceedings were conclusive and that they could not be collaterally attacked; and it held that a lost will could not be proved in common form and could be proved only by a proceeding in equity. The Supreme Court reversed, declaring that, under the statutes regulating the probate of wills — Secs. 8932, 8933,

S. C. Code of Laws of 1942 — lost wills could be probated in common form, and that the will, having thus been admitted to probate in the first instance, could not be collaterally attacked. The Court buttressed its conclusion by holding that the facts demonstrated that the will had been accidentally destroyed by fire, as contended for by the proponent, and that the presumption of destruction *animo revocandi* was overcome.

The *Davis* case is especially significant and useful in that it makes plain, for the first time, that a lost will may be probated in the Probate Court and *in common form.* On the basis of the authorities there cited, there can be no reasonable dissent from the proposition enunciated by the Court, and it seems clear from the review of the cases hereinabove that wills allegedly lost had been proved in the Probate Court, although it is not apparent that the proof was in common form to begin with. The *Davis* case is unique in that not all of the witnesses were known.

While the *Davis* case clearly states the law and thus serves the useful purpose of making known the procedure for establishing a lost will, unfortunate consequences follow the rule laid down, however unassailable the reasons upon which it is based. As has been previously pointed out, there is a presumption that a will that cannot be produced has been revoked by the testator, and this presumption must be overcome by the proponent. The question naturally arises whether it is fair or just that a proponent, with a presumption against him to start with, ought to be allowed to prove a will *in common form,* which is an *ex parte* proceeding, in which adversary parties are only constructively present and of which they have been given no notice. It is true that wills may thus be proved — and it is the usual procedure — but where the *original will itself* is produced for probate, the proponent is armed with presumptions of regularity, competency, etc., and the admission of a will regular on its face to probate in common form is merely a sanction or recognition of facts presumed to exist. It is then incumbent upon a contestant to institute proceedings to have the will proved in solemn form. But where the will is lost or cannot be produced, the proponent, without notification to parties adversely interested, is allowed to overcome a presumption which does not exist in his favor. The Probate Judge may or may not be satisfied with the version of the proponent relating to the circumstances attendant to the non-production of the will. In the *Davis* case he was, but the antagonists were not before him, nor was there any opportunity or requirement for them to be. In admitting the will thus to probate, the Judge accepted an explanation sufficient to overthrow a presump-

tion, in contrast to the cases where the production of a will regular on its face authorizes the proof, without explanation, and in keeping with existing presumptions. It is true that the aggrieved parties might institute a proceeding within a year following the probate of the will to common form to have it set aside, but the major problem still is, law or not, whether a party *should* be allowed to prove a lost will in a common form proceeding, which presupposes the absence of parties adversely affected.

There is no objection to the Probate Court, as a court vested with the authority to admit wills to probate, admitting lost wills to probate, but it might well be argued that the ends of justice might better be served if the proponent of a lost will had to prove the will in solemn form, with the heirs thus made parties at the outset. Such proceedings could be maintained in the first instance in the Court of Common Pleas as part of its concurrent jurisdiction, but, if the Probate Court is to entertain jurisdiction, there is reason to limit it to proceedings to prove in solemn form.

One other point is worthy of note in observing the *Davis* case. The will was admitted to probate in common form on the testimony of one witness — which, ordinarily, is sufficient — but with the names and identities of the other witnesses unknown. If the disinherited heirs had contested the probate by compelling a proceeding in solemn form, they were bound to have succeeded, because, in a proceeding in solemn form, the proponent must produce *all three* witnesses to the will. Sec. 8932. Since the witnesses were unknown, it would have been impossible to produce them and impossible to prove the will. Moreover, in two cases dealing with lost wills, the Court has stated that the witnesses must be known, so that their credibility can be tested, in view of the statutory requirement that there must be at least three "credible" witnesses. Sec. 8916, S. C. Code of Laws of 1942. *Watkins v. Watkins, supra; Bauskett v. Keitt, supra.* It seems singular and contradictory that a will contest which cannot possibly be won by a proponent where the witnesses are unknown can be successfully averted and turned into a victory by the process of proof in common form and a failure to attack by those who, if they would assail the will, must necessarily prevail. No such contradictory result or paradox could occur if proceedings to prove lost wills were taken out of the *ex parte,* common form class.

Presentation of Claims Against Decedents' Estates

The pertinent Code sections dealing with the presentation of claims against estates of decedents provide as follows:

Sec. 8993, S. C. Code of Laws of 1942, as amended by Acts 1943, No. 177, 43 Stat. 260:

"(a) Every executor or administrator shall, within thirty days (30) after qualifying as such, or as soon thereafter as may be practicable, give notice by advertisement once a week for three consecutive weeks in a newspaper printed in the County in which the estate in his charge is being administered, or, if there be no newspaper printed in such county, in a newspaper of general circulation in such county for creditors of the estate in his charge to render account of their demands, duly attested, and he shall be allowed twelve months to ascertain the debts due from the deceased, reckoning from the date of his qualification as such executor or administrator."

"(b) All claims of creditors of such estate shall, upon the expiration of eleven months after the first publication of the notice prescribed in sub-section (a) be forever barred unless before the expiration of such period an account thereof, duly attested, shall have been filed with such executor or administrator, or with the Judge of Probate of the county in which such estate is being administered; *Provided, however,* that the provisions of this sub-section (b) shall not apply to obligations secured by mortgages or other liens which have been duly recorded prior to the expiration of such period."

Sec. 8994: "If any creditor shall neglect to give in a statement of his debts within the time aforesaid, the executors or administrators shall not be liable to make good the same."

The purpose and effect of the amendments appended, in 1943, to Section 8993 have been to make the statute a genuine non-claim statute: *i. e.,* one barring claims not presented within a prescribed period. To that extent, such a statute becomes a "short" statute of limitations, abridging the ordinary statute of limitations. This type of statute exists in most, if not all, jurisdictions. Prior to the amendments, Sections 8993 and 8994 were held not to be non-claim statutes; so that a creditor who did not file his claim within a year following the inception of administration was not precluded thereafter from asserting his claim or maintaining an action upon it; and, in fact, even if the estate had been closed and the personal representative discharged, there might be a reopening of the estate for its presentation. The intent of the statutes before their amendment was merely to protect the executor or administrator who had paid debts of which he knew and had

made distribution. *Ford v. Rouse,* Rice's Law 219; *Knotts v. Butler,* 10 Richardson's Equity 143; *McNair v. Howle,* 123 S. C. 252, 116 S. E. 279; *Columbia Theological Seminary v. Arnette,* 168 S. C. 272, 167 S. E. 465.

The overall aim of the amendments is commendable, but the proviso at the conclusion of sub-section (b) is subject to criticism. It undertakes to except from the provisions of the amendment *obligations* secured by mortgages or other liens duly recorded before the expiration of the period. The effect is not merely to preserve the lien of mortgages and other encumbrances, but also to preserve the *obligations* or debts secured by them; so that a mortgagee or other lien creditor of record who did not present his claim within eleven months from the first publication of the notice would have, under the exemption thus granted, not only his security or lien intact, but his claim for personal liability — out of the general assets — would be saved as well. The general rule in practically every jurisdiction having a non-claim statute is that the holders of specific liens are not prejudiced by their failure to present their claims within the prescribed period, *so far as their liens are concerned,* but that they lose their right to participate in the general assets or obtain a deficiency. 21 Am. Jur. 585; 34 C. J. S. 175; annotation 78 A. L. R. 1127. Even without the proviso the holders of specific liens would not be hurt as to their liens by failure to file claims seasonably. The injustice and the inconsistency of depriving unsecured creditors from participation in the general assets of the estate because of their omission to file claims, and permitting, on the other hand, secured creditors to reach those assets, in addition to their resort to the mortgaged or other incumbered property, are obvious. Furthermore, by a strict application of the proviso, it is possible for a mortgagee or other specific lienholder who has a worthless security (and who thus is, for all practical — if not legal — purposes an unsecured creditor) to refrain from filing his claim and yet be allowed to participate equally with those creditors who have filed claims and to exclude those who have not. It is submitted that the lienholder is not entitled to such special protection. If he wishes to participate in the general assets, he ought to be required to file his claim as any other creditor.

The distinction between enforcement of personal liability and the enforcement of the security is, of course, important. It can be pointed up by reference to those cases which permit the maintenance of foreclosure actions against the heirs or devisees of a deceased mortgagor, without the joinder of the personal representative of the decedent, where no judgment for a deficiency is asked. *Bryce v. Bowers,* 11

Richardson's Equity 41; *Trapier v. Waldo,* 16 S. C. 276; *Butler v. Williams,* 27 S. C. 331, 3 S. E. 211; *Columbia Theological Seminary v. Arnette, supra.* The principle is embodied and further declared in the Code: Secs. 478, 8708. Conversely, an action seeking, in addition to foreclosure, a judgment for a deficiency cannot be maintained without the personal representative of the deceased mortgagor-debtor being made a party. *Columbia Theological Seminary v. Arnette, supra.* The distinction is further to be observed in the operation of Sec. 418 of the Code, which forbids the institution of actions "for the recovery of debts" due by a testator or intestate within twelve months following the decedent's death. The section has been held not to apply to actions to foreclose mortgages where no deficiency judgment is asked, and, accordingly, such an action can be maintained within the proscribed period. *Green v. McCarter,* 64 S. C. 290, 42 S. E. 157; *Collins v. Collins,* 207 S. C. 452, 36 S. E. (2) 584 (pledge).

Another criticism is to be noted: the requirement that the mortgage or other lien which comes within the exception must be recorded. Whether the proviso protects merely the lien, or both the lien and the debt it secures, the dependence of the security's vitality upon its recordation is difficult to understand or justify. The purpose of recording is, of course, to protect subsequent purchasers and creditors. When such subsequent parties are not involved, the failure to record is immaterial, since, as between the parties, the transaction is valid without recording, and the average lien is perfected without recording. It is not easy to perceive the connection between the recording of a lien and the presentation of a claim based on it. Whatever rights a lienholder may have should not be made to turn upon recording, where the rights of third parties, as subsequent dealers, are not involved. There is a danger, too, that, if by any chance the proviso is construed as affecting merely the lien, and not the debt it secures or represents, the failure to file a claim may destroy even the lien if it has not been recorded, a result clearly at odds with the nature and purpose of the recording acts.

The statutes in their amended form have not been construed by the courts. It is possible, of course, that definitive judicial interpretation may sooner or later be given; but before that time arrives, a legislative revision might be considered desirable.

Although it is not of major concern, the matter of unmatured and contingent claims under the present statutes gives rise to some uncertainty. The importance of the status of such claims is magnified by the conversion of the statutes into non-claim statutes. Before the

be relatively unimportant (so far as their continued existence was concerned), no matter how long after the inception of administration, so long as the estate was open or assets could be reached. Oddly enough, there has been no significant litigation affecting these types of claims in South Carolina. Unmatured claims were dealt with in *Relph v. Gist,* 4 McCord's Law 267, where the issue was the right of a representative to retain funds to pay a debt represented by a specialty not yet matured as against a debt of an inferior grade; and in *Hutchinson v. Bates,* 1 Bailey's Law 111, where the question concerned the rank of a specialty debt not yet due as compared with that of specialty debts which were due. In neither case was the matter of presentation involved. Unmatured debts are, of course, allowable debts, and, in most jurisdictions, such debts are included in the catagory of claims which must be seasonably presented under applicable non-claim statutes, even though express reference may not be made in the statutes to such claims. 24 Am. Jur. 584; 34 C. J. S. 172. Presumably, in the light of the prevailing rule, unmatured claims must be presented within the eleven-months period, called for by the local statute, to retain their enforceability. It may, however, be worth considering whether the status of unmatured claims should not be more precisely spelled out legislatively.

Contingent claims — unlike unmatured claims — being those which may never actually arise (as in the typical case of suretyship) are not easily dealt with. The difficulties surrounding the allowability and payment of such claims are apparent without illustration. If such claims actually ripen into fixed claims, the liability is certain and the claims are manifestly allowable; but until the contingency occurs — as in the case of a principal's default where the decedent was a surety — the claim is one which the representative does not have to pay. In *Knotts v. Butler, supra,* a guarantor's estate was held liable to contribute to a co-guarantor who had paid the creditor the whole debt, which was not in default until after the guarantor's death. The liability was, of course, contingent — as to the creditor, until the principal's default; as to the co-guarantor, until payment of the debt by him. Upon payment by the co-guarantor the liability became certain and the claim was held allowable, although the creditor had not notified the deceased guarantor's representative of the guaranty. Here, the contingency had become absolute during the course of administration, and the question of the allowability of a contingent claim as such did not arise. In most jurisdictions, non-claim statutes which make no specific provision for contingent claims are held not to bar such

claims, and they may, accordingly, be filed after the stated period has passed. 34 C. J. S. 169; 21 Am. Jur. 582; annotations 41 A. L. R. 144, 47 A. L. R. 896. Presumably, if the general rule is to be followed, the South Carolina statutes will be similarly applied, and contingent claims will not be affected by failure of filing. There are statutes in several states that specifically bracket contingent claims with ordinary claims, and there is a trend in that direction. Model Probate Code, Sec. 135. There is considerable merit on both sides, and at least some thought should be given to the relative position of each.

MINORS' CONTRACTS

The basic law of the liability of minors on contracts made by them is, by now, quite well established and fairly easily understood. Without needless citation of authority, it is sufficient to say that, generally, the contract of an infant is voidable, except in the cases of necessaries furnished, and that the contract of an infant may be affirmed or ratified upon or after the attainment of the infant's majority. The effect of the ratification or affirmance is to cut off the right to disaffirm or to avoid the contract. The old distinction between contracts as beneficial or harmful, treating the beneficial contract as subject to ratification, and the harmful contract as void and hence incapable of ratification, has long since ceased to prevail; and all contracts, hurtful or helpful, may be affirmed, subject to a statutory requirement — Sec. 7048, S. C. Code of Laws of 1942 — that ratification of such contracts be in writing. *Williams v. Harrison,* 11 S. C. 412; *Dickert v. Insurance Co.,* 176 S. C. 476, 180 S. E. 462.

The South Carolina Code contains an astonishing set of statutes that, for a large class of the infant population, departs from the general rules stated. Section 8669 of the Code provides:

> "Any contract or agreement whatsoever, express or implied, by any undergraduate of any of the colleges or institutions of education in this State, who shall be a minor, with any shopkeeper, upon the sale of any wines, ardent spirits, goods, wares or merchandise, or any article of trade, or with the keeper of a hotel, house of entertainment, or livery stable, shall be held and deemed utterly null and void, insomuch that no confirmation of the same by such student, after he may have attained the age of twenty-one years, shall render such contract or agreement of legal obligation."

It is further provided in succeeding sections:

> Sec. 8670. "It shall not be lawful to issue any process, either from a magistrate or from any court of record in this State,

against any such student, upon any such contract or agreement as aforesaid, at any time; nor shall any confession of judgment upon the same be lawful or binding, or be allowed to be entered up."

Sec. 8671. "In case any judgment shall be confessed, or obtained contrary to the prohibition hereinbefore expressed, the same shall be vacated and annulled by any judge of the common pleas, at chambers or in open court, upon any information that the said judgment is in contravention of the intent of sections 8669 and 8670."

Sec. 8672. "The provisions of sections 8669, 8670 and 8671 shall not apply to any apothecary, so far as his dealing may concern the sale of drugs and medicines."

Aside from the merits of these statutes, there are ambiguities in profusion to perplex and confound the student, the shopkeeper or other provider of goods or services, not to mention the lawyers and the judges. Does the term "institutions of education" embrace *any* institution of learning — *any* school — or is it limited to institutions of *higher* education? Does the term "undergraduate" exclude students who have received so-called undergraduate, or academic, degrees but are taking graduate work? Does the term include or exclude students who have not received undergraduate degrees but who are taking graduate work, such as in a law school? Does it apply to "special students", who take a limited number of courses but who are not applicants for a degree? Does it include students in the current vocational or trade schools, either publicly or privately operated? Does it affect the so-called "opportunity schools", in which persons of adult or near-adult age receive elementary education? Does it cover the case of persons taking college correspondence courses? Do the statutes affect contracts made by students during holidays, between semesters or on vacation, or while they may be in places outside of the town or city in which the particular school may be located? Does "livery stable" have a modern and new connotation, sufficient to embrace garage-keepers or persons having automobiles to rent? How do the statutes affect executed contracts, or partially executed ones? To pose the questions is merely to demonstrate the unsatisfactory set of problems that the statutes present.

The statutes were enacted in 1853 (12 Stat., 296). There is no preamble stating the basis or motivation for them nor have there been any decisions interpreting these sections.

Regardless of whatever description of beneficiaries may be covered by these statutes, their salient import is that the affected minors may

receive goods and services from the persons mentioned, and that their contracts so made are *void* and specifically incapable of ratification after their beneficiaries have come of age. The contracts are not merely voidable. Furthermore, the language is broad enough, and the intent is plain, to include even contracts for necessaries. This is apparent particularly from the exception made in Section 8672 in favor of apothecaries.

If the statutes embrace *all* students, at or below college level, then a large proportion of the infant population is exempt completely from liability on all contracts involving sales (except for medicines) or the rendition of specified services. If they are limited to students of college level, then, while their proportion to the whole infant population is not quite so large, the number is still sufficiently large in itself. Whether the legislature in 1853 was thinking of student welfare — that is to say, the welfare of the students as individuals — by shielding them from the harassments and suits of unpaid shopkeepers, to the greater devotion to their studies; or whether it was thinking in terms of the public good and the promotion of public education by the production of a class of earnest and undisturbed students, whose unalloyed talents would thus be made available to society — the legislative mind or purpose has never been made manifest. Whatever may have prompted this legislative concern nearly a century ago, it is hard to believe that any set of conditions exists today that entitles students to a continuation of such legislative tenderness. The creation of a class of educational elite, who, despite their superior training, can thus "beat" their creditors and even be shielded from the post-infancy recognition of their contracts, is hardly to be commended. In the meantime these insensible, and presently unsensible, sections repose obscurely — but dangerously — in the Code. They could well be gotten rid of. There is enough case law to protect the minor from his improvident contract.

Gifts to Illegitimates

Adoption of Illegitimates

The whole matter of the status of illegitimate children is one that might well be reviewed, not merely from the point of view of property rights, succession on death, and so on, but also with respect to the position of such children in society, and the relations, privileges and duties of such children and of their parents. Such a study, however, would be beyond the capacities of the Committee on Jurisprudence and Law Reform, and it must content itself with some of the more important

or interesting phases of the problem. In its last — 1949 — report, the Committee dealt with the status of a child born out of wedlock whose parents subsequently married, and the necessity for enlarging as a statewide law the limited statutory provisions legitimating such a child, as provided in Section 255 (19) of the S. C. Code of Laws of 1942. The Committee does recommend, as a generality, that continued inquiry be made into the status of illegitimates, drawing upon the legal systems of other states for features that might be worthy of incorporation into our system. Specifically, for the purposes of this report, the Committee presents to the Bar Association the problems of gifts to illegitimates and the adoption of illegitimate children, with the usual recommendation that serious thought be given to the wisdom or lack of wisdom of present legislation and the desirability of modification.

There are two Code sections which affect gifts to illegitimates (and they also include gifts to a woman with whom a donor lives in adultery); and a third which deals with gifts to illegitimate children as a part of, and in connection with, the law of adoption. The first two are commonly called the "Bastardy Acts", and they provide:

> Sec. 8695. "If any person who is an inhabitant of this State, or who has an estate herein, shall have already begotten, or shall hereafter beget, a bastard child, or shall live in adultery with a woman, the said person having a wife or lawful children of his own living, and shall give, or settle, or convey either in trust or by direct conveyances, by deed of gift, legacy, devise or by any other ways or means whatsoever, for the use and benefit of the said woman with whom he lives in adultery, or of his bastard child or children, any larger or greater portion of the real clear value of his estate, real or personal, after payment of his debts, than one-fourth part thereof, such deed of gift, conveyance, legacy or devise, made or hereafter to be made shall be null and void, only in favor of wife and legitimate children, for so much of the amount or value thereof as shall or may exceed such fourth part of his real and personal estate."
>
> Sec. 8927. "If any person who is an inhabitant of this State, or who has any estate therein, shall beget any bastard child, or shall live in adultery with a woman, the said person having a wife or lawful children of his own living, and shall give, by legacy or devise, for the use and benefit of the said woman with whom he lives in adultery, or of his bastard child or children, any larger or greater proportion of the real clear value of his estate, real or personal, after paying of his debts, than one-fourth part

thereof, such legacy or devise shall be null and void for so much of the amount or value thereof as shall or may exceed such fourth part of his real and personal estate."

It is to be noted that the latter section is virtually a duplicate of the first, except that it is limited to legacies or devises, while the first embraces not only testamentary gifts but conveyances as well. The first of the two statutes, from which the second is drawn, was enacted, in practically the same language in which it is now couched, in 1795. 5 Stat. 271. It is the successor to an earlier statute of similar import enacted by the Provincial Assembly in 1703. 2 Stat. 226. The earlier Act declared gifts to bastard children, as against lawful children or grandchildren, void as to the excess of one-tenth of the donor's estate, not exceeding one hundred pounds. It made no mention of gifts to a donor's mistress. Thus, for nearly two hundred and fifty years, there has been a statutory restriction upon gifts to illegitimates in certain cases.

A search of available material indicates that there are only two states in which a restraint is placed upon gifts to illegitimates. These states are Louisiana and South Carolina. Vernier, American Family Laws, Sec. 251; 7 Am. Jur. 713; 10 C. J. S. 142. It is singular, to say the least, that such a unique and isolated position should be maintained by only two states. In one of them — Louisiana — the situation may be attributed to the influence of a tradition and system of law at variance with the English common law. Although uniqueness is not in itself a reason for eliminating a policy — and, in fact, it is sometimes a thing to be proud of — it does, at least, cause doubt as to the rightness of a position not accepted by more than one other, and it well warrants a consideration of the intrinsic merit of the position so taken.

At common law, despite the onerous and odious status of bastards, there is no restriction on gifts either *inter vivos* or by will to them; and, in the absence of restraining statutes such as ours, such gifts can be freely made by a donor to his illegitimate children to the exclusion of his lawful children. 7 Am. Jur. 713; 10 C. J. S. 142; *Harten v. Gibson,* 4 DeSaussure's Equity 139. And the same is apparently true of gifts made by a man to his mistress, although he may be impeded somewhat, if he is married, by his wife's dower right. *Cusack v. White,* 2 Mill's Constitutional Reports, 279; *Denton v. English,* 2 Nott & McCord 581. The policy actuating the bastardy Acts is not revealed in the preamble of the Act of 1703; and there is no preamble or declaration of policy to indicate the legislative motivation for the Act of 1795. There are, however, judicial utterances

reflecting what is deemed to be the policy of the Acts. In *Taylor v. McCra,* 3 Richardson's Equity 96, it is stated: "Its great object is to brand and punish incontinence in particular cases by restricting, to a limited extent, bounty to a mistress or bastard". In *Hull v. Hull,* 2 Strobhart's Equity 174, this statement is made:

> "The general scope and intention of this Act are very evident. Its provisions were intended (so far as the Legislature could safely interpose for that purpose) to prevent a man who had forgotten his domestic duties, from squandering his property upon the object of his perverted affections, to the wrong and injury of his family; and by depriving him of the means of regarding the associates of his vitiated appetites or providing for their progeny, to discourage both him and them from entering into such immoral and pernicious connexions."

On the whole, these quoted utterances represent what is felt to be the purpose of the legislation. There seems to be no particularly great amount of judicial indignation directed at dispositions made in contravention of the statutes as being inherently bad or vicious. The course of application of the statutes by the courts has been one of fairly strict interpretation, and the conditions under which the penalty will fall must almost literally exist. Thus, as against all others but a lawful wife and children, a donor may give his entire estate to this mistress or illegitimate children. *Harten v. Gibson, supra; Hull v. Hull,* 3 Richardson's Equity 65; *Williams v. Halford,* 73 S. C. 119, 53 S. E. 88. The right to assert the statutes against the mistress or illegitimate children is personal and exclusive to the wife and lawful children, and can be asserted only by them and not by their representatives or successors (except where the wife is a lunatic); the prohibited gift, too, being not void, but voidable only at the instance of such wife and children. *Breithaupt v. Bauskett,* 1 Richardson's Equity 465; *Ford v. McElroy,* 1 Richardson's Equity 474; *Taylor v. McCra, supra; Williams v. Halford, supra; White v. White,* 212 S. C. 440, 48 S. E. (2) 189; *Bynum v. Insurance Co.,* 77 Fed. Supp. 56. And a gift to mistress or bastard children is good against grandchildren, although if an attack is successfully made by a wife or lawful children the result enures to the benefit of children of a predeceased lawful child. *Hull v. Hull,* 2 Strobhart's Equity 174; *Williams v. Newton,* 86 S. C. 248, 68 S. E. 693; *White v. White, supra.* A gift to an illegitimate grandchild (the legitimate child of an illegitimate child of the donor) is good against the lawful wife and children. *Hull v. Hull,* 2 Strobhart's Equity 174. Policies of life insurance payable

to a mistress or illegitimate children are good and not affected by the statutes. *White v. White, supra; Bynum v. Insurance Company, supra.*

Leaving aside for the time the merits of the statutes, they are not entirely clear in their meaning. The mode of estimating the "real clear value" of the donor's estate where *inter vivos* gifts to mistress or illegitimate children are involved has always presented difficulty. See *Bradley v. Lowry,* Speers' Equity 1; *Williams v. Halford, supra.* The status of bona fide purchasers from a mistress or illegitimate children who are grantees or testamentary beneficiaries seems not yet to have arisen, though, obviously, it is one of some importance.

As to the wisdom, logic or fairness of the statutes, the law stands in need of reconsideration. It is basic that, absent restraining legislation, a testator may dispose of his estate as his desires prompt him, and his disposition will be upheld — so long as he is competent and the act is a voluntary one — no matter how unreasonable, capricious, arbitrary or unnatural it may be. This right is zealously guarded by the courts as a testamentary privilege — although it may work hardship on deserving objects of bounty and offend the sense of moral justice. The cases are too numerous for full citation, but see, as typical, *Lee v. Lee,* 4 McCord's Law 183; *Woodward v. James,* 3 Strobhart's Law 552; *Means v. Means,* 5 Strobhart's Law 167; *Kaufman v. Caughman,* 49 S. C. 59, 27 S. E. 16; *Smith v. Whetstone,* 209 S. C. 78, 39 S. E. (2) 127; In re *Estate of Washington,* 212 S. C. 379, 46 S. E. (2) 287. With this legal sanction, a testator can give away his property to strangers, depriving wife and children of his estate, except as to the wife's right of dower. What may be equally obnoxious morally, he may arbitrarily favor one child over another, or make a similar unnatural discrimination among members of his family — with resultant family discord producing an effect more deplorable and unseemly than the exclusion of the family altogether in favor of a stranger. If such dispositions, with their unfortunate results, can be justified as part of the privilege of ownership, it is hard to envision the consistency of curbing gifts to the mistress or illegitimate children, who, after all, are not strangers and have, at least, some tangible claim upon the donor. It is arguable that it is probably a greater sin to cut out a wife or children in favor of a stranger, or to create family friction by arbitrary preferment among its members, than to exclude the wife and children in favor of the paramour and the bastard. And if testamentary freedom is granted, the reasons are even stronger in the case of *inter vivos* transfer.

That the "great object" of the bastardy Act — to discourage living in sin — is actually served by the Acts is dubious indeed. It would be highly imaginative to suppose that the statutes act as a deterrent to adulterous living, although they may restrain the dispositions covered by them. The effect is punitive, not preventive, of the unlawful relationship, and the punishment is not visited upon the man — since the statutes can be invoked, even as to gifts he has made during his lifetime, only upon his death. The blow falls upon the mistress or illegitimate children for whom he may have provided; and, while there may be some element of justice in thus punishing the paramour for the sordid act, the offspring of such a relationship can hardly be deemed deserving of punishment for an act which they did not commit.

The stigma of bastardy remains to this day, but the status of the bastard has, over the years, undergone considerable amelioration; and it is in the light of changing attitudes that these statutes should be viewed. With the advent of divorce laws in the state, providing adultery as a ground of divorce, a wife has new recourse against her erring husband. Cases may be supposed in which the statutes, instead of working good, work harm. A donor may have adult children, financially well-off, and illegitimate children in need of care. Yet his gifts to the latter may be avoided by the former, although he could have given all his estate to a stranger. He may have been deserted by his wife, or the wife may have committed adultery, and the husband, without divorcing his wife, lives in adultery with another woman — yet, while he can exclude his wife for strangers, he cannot exclude her in favor of the adulteress or his unlawful offspring. The statutory laws that work a forfeiture of the wife's dower or estate for misconduct do not touch this case. Or the donor may have amply and generously provided for his wife and children by gifts during his lifetime, or by insurance, or both; but, under the statutes, the gifts to mistress or illegitimate children are nevertheless affected. In any event, however, the great weakness of the statutes — though legislatively proper — is the inconsistency, previously pointed out, of permitting as against lawful wife and children gifts to strangers but restricting them when made to mistress and illegitimate children; even though it must be admitted that the chances of his excluding wife and children in favor of strangers is less likely than his excluding them in favor of mistress or illegitimate children. There would be considerably more merit in legislation designed to protect a wife and children against *all* persons not a part of the family circle. Particularly is this true in the case of a wife; and many states have statutes — which it might be wise

to copy — that protect the wife by making her a "forced heir", who cannot be disinherited and who may elect to take against a will.

The prohibitory features of the bastardy Acts are carried over, to some extent, into the adpotion laws of the state. The general adoption statute — Sec. 8679, S. C. Code of Laws of 1942 — after making provision for adoption of children and setting up the procedure for it, declares:

> "* * * * *provided,* that no person in this State shall adopt an illegitimate child unless the father and mother of such child, if both were unmarried at the time of its birth, could have lawfully contracted matrimony under the Constitution and laws of this State, nor when the person seeking to adopt an illegitimate child has, at the time of filing the petition, either a lawful wife or child, unless the wife is the mother of such illegitimate child, and unless the wife file her written consent to said adoption in the office of the clerk of court of the county wherein said petition is filed; *provided, further,* that no person who adopts any illegitimate child shall give to such child by deed, will or otherwise, any greater portion of his estate than is now allowed by law, unless such person has no lawful wife or issue living at the time of his death; nor shall such illegitimate child inherit, in case of intestacy, from the adopted parent any greater estate than may be given to such child by deed or will when such intestate leaves a widow or lawful issue surviving him; *provided, further,* that where the custody of any child is given to any person or persons by any orphan or foundling home, and said person or persons desire to adopt said child, they may file their petition in accordance with the provisions of this chapter in the county where said petitioner or petitioners reside, and it shall not be necessary to prove who is the father or mother of said child."

The most charitable description that can be applied to the quoted language is that it is ambiguous. Taking the various provisions somewhat out of order, it is to be noted that a person adopting an illegitimate child cannot give to the adopted child "any greater portion of his estate than is now allowed by law", and that such a child cannot inherit from the adoptive father more than the latter could have given him, if the adoptive father leaves a widow or "lawful issue" surviving him at the time of his death. The reference to existing law is obviously to the bastardy Acts. Here the reference becomes either meaningless or absurd. A married man, or father of lawful children, is not forbidden by the bastardy Acts to give any part of his estate

to any child save his own illegitimate child; he can give all of his estate to some one else's illegitimate child. The curious result under this statute is that he may give his whole estate to the illegitimate child of another person, but if he adopts him he cannot. On the other hand, it is quite possible that a court may say that since no existing law forbids a man, who has a wife or lawful children, from giving to any child except his own illegitimate child, the proviso cannot extend to adopted children who, although illegitimate, are not his own. At any rate, whatever authoritative meaning may ultimately be given, in the meantime the language is too muddy to be applied intelligently. In one respect the adoption statute goes even further than the bastardy statutes. Under the latter, as has been noted, the gifts proscribed are not avoided in favor of descendants generally — only as to children. In the adoption statute the term employed is not "children" but "issue". That term is not limited, in its primary meaning, to children, but applies to an indefinite line of lineal descent. *Lucas v. Schumpert*, 192 S. C. 208, 6 S. E. (2) 17. The paradox here would be that a grandparent could exclude altogether his lawful grandchildren under the bastardy statutes if they were his sole heirs, but that he could not exclude them if he adopted an illegitimate child — certainly if the child were his own and perhaps if it were that of someone else. It may be, again, that these provisos can lend themselves to different meanings than those suggested here, but the obvious possibility of such varied interpretations is itself ground for impeaching the utility of the provisions.

The first part of the opening proviso quoted — "that no person in this State shall adopt an illegitimate child unless the father or mother of such child, if both were unmarried at the time of its birth, could have lawfully contracted matrimony under the Constitution and laws of this State" — obviously contemplates, though not necessarily exclusively, a child born to parents of different races forbidden to marry by law. Constitution 1895, Art. 3, Sec. 33; Sec. 8571, S. C. Code of Laws of 1942. A child born to a white father and a colored mother would thus be affected. The child is by law treated as a colored person. No white person could adopt that child. But by the same law a negro could not adopt the child either. Whether the language would also cover the case of the child of an incestuous marriage is still another matter of difficulty. Sec. 8556, S. C. Code of Laws of 1942.

The remaining part of the first quoted proviso is, to say the least, startling — "nor, when the person seeking to adopt an illegitimate child has at the time of filing the petition either a lawful wife or child, unless the wife is the mother of such illegitimate child, and unless the

wife file her written consent to said adoption * * *." If the language means what it says — and no court has said otherwise — an illegitimate child cannot be adopted unless the adoptive father's wife is herself the mother of the child *and* unless she consents to its adoption. (If the word "and" before "unless the wife file her written consent" could be changed to, or made to read, "or", the language would, in some degree, be more understandable.) If the child had been born out of wedlock to parents who subsequently marry, the father could adopt his own child with the wife's consent. (In some counties, under a statute of doubtful constitutionality, the subsequent marriage of the child's parents would legitimate the child. Sec. 255 (19), S. C. Code of Laws of 1942. See report of this Committee for 1949.) If the child is not the adoptive father's, it would be necessary, for purposes of adoption, that it be the child of the wife, born to her either before or after her marriage. Certainly it would be an act of the most generous forbearance and forgiveness for a husband to adopt his wife's illegitimate offspring. Needless to say, such noble examples are rare. The net conclusion to be drawn is that, except in rare cases, a married man cannot adopt an illegitimate child. This, undeniably, is disturbing, because it is a fact that many adoptions take place where the child adopted is the illegitimate child of some one other than the adopting parents. This is particularly true of adoptions processed through the Children's Bureau and through foundling, or similar, homes. If the analysis of the adoption statute here given is correct, the rights of many adopted children rest upon a very shaky foundation.

The concluding proviso dispensing with the necessity of proving who is the father or mother of a child whose custody is given by an orphan or foundling home does not help much, since it dispenses only with proof of the identity of the parents in proceedings and does not purport to alter the other requirements for adoption.

Where the proposed adoptive father has a lawful child but no wife, the result is even harsher, because there can be no adoption of an illegitimate child if there is a lawful child. There is no provision for the latter's consent.

It may be urged that it could not have been the legislative intention to restrict so severely the adoption of illegitimate children. But to this it must be answered that, while successive legislatures may have perpetuated the statute, the statute reflects the wishes of the legislature that first enacted it. The atmosphere of the time, not that of to-day, is what has given rise to it. Actually, the first general adoption statute was limited expressly to *legitimate* children. 21 Stat. 78 (1892). The same limitation was repeated in the next version.

22 Stat. 11 (1896). It was not until 1900 that permission was granted to adopt illegitimate children, and then with the restrictions substantially in the form now appearing. 23 Stat. 429. It must be remembered, too, that the statute — with all amendments except one — was enacted prior to the first general statute allowing an illegitimate child to inherit. 25 Stat. 156 (1906).

To sum it up: The adoption statute makes bad reading and bad law. If there ever was a statute that needed change both for the sake of clarification and for the sake of erasing inequities, the adoption statute is a prime example.

The Report of the New Member Committee was then presented by Mr. Claude Fort, Chairman. The following new members were introduced:

NEW MEMBERS OF SOUTH CAROLINA BAR ASSOCIATION

Abercrombie, Marshall W. ..... Fountain Inn, S. C.
Acker, William G. ..... Pickens, S. C.
Anderson, Joe F. ..... Edgefield, S. C.
Barron, S. E. ..... Union, S. C.
Britton, J. B. ..... Sumter, S. C.
Burts, Samuel N. ..... Spartanburg, S. C.
Cabaniss, Joseph W. ..... Charleston, S. C.
Cannon, Emil T. ..... Florence, S. C.
Chapman, Robert F. ..... Spartanburg, S. C.
Charles, William K., Jr. ..... Greenwood, S. C.
Cox, J. W. ..... Johnston, S. C.
Creason, Claude E., Jr. ..... Columbia, S. C.
Cushman, Edward C., Jr. ..... Aiken, S. C.
Drummond, Charles M., Jr. ..... Spartanburg, S. C.
Flynn, J. Raymond ..... Union, S. C.
Gantt, Robert J., Col. ..... Spartanburg, S. C.
Gibbs, James L. ..... Columbia, S. C.
Gregory, George T., Jr. ..... Chester, S. C.
Hamer, Edward R. ..... Greenville, S. C.
Harrison, Frank E. ..... McCormick, S. C.
Hennig, Julian, Jr. ..... Columbia, S. C.
Henson, Shannon ..... Spartanburg, S. C.
Hughes, Jerry M., Jr. ..... Orangeburg, S. C.
Ingram, Thomas B. ..... Cheraw, S. C.
Jennings, John W. ..... Columbia, S. C.
Johnson, Edwin W. ..... Spartanburg, S. C.

Jolly, Mike S. ..... Union, S. C.
Kester, G. S., Jr. ..... Columbia, S. C.
Lane, Berry D. ..... Bishopville, S. C.
Leppard, Edward M. ..... Chesterfield, S. C.
Lester, S. Evelyn ..... Columbia, S. C.
Littlejohn, T. C., Jr. ..... Gaffney, S. C.
Mann, W. C. ..... Pickens, S. C.
Merchant, Arnold R. ..... Spartanburg, S. C.
McCants, Clarke W., Jr. ..... Columbia, S. C.
McChesney, Paul S., Jr. ..... Spartanburg, S. C.
McClure, J. F. ..... Union, S. C.
McKay, J. W. ..... Columbia, S. C.
McKown, J. Z. ..... Gaffney, S. C.
McLeod, William J. ..... Dillon, S. C.
McMillan, Edward W. ..... Gaffney, S. C.
Miller, Walter B. ..... Spartanburg, S. C.
Mims, M. H. ..... Edgefield, S. C.
Nolen, John H. ..... Spartanburg, S. C.
Odom, Robert R. ..... Spartanburg, S. C.
Poag, James D. ..... Greenville, S. C.
Powell, Roy A. ..... Columbia, S. C.
Purdy, Robert O., III ..... Sumter, S. C.
Rainwater, Jacquelyn (Miss) ..... Greenville, S. C.
Rhodes, William L., Jr. ..... Hampton, S. C.
Rice, Oliver O. ..... Macon, Georgia
Richardson, Henry B. ..... Sumter, S. C.
Ridley, Charles B. ..... Rock Hill, S. C.
Ruffin, Colin B. ..... Bishopville, S. C.
Sams, Sumter B. ..... Spartanburg, S. C.
Sansbury, Paul A. ..... Darlington, S. C.
Searson, Louis A., Jr. ..... Columbia, S. C.
Sindler, Jerold B. ..... Bishopville, S. C.
Smith, Horace C. ..... Spartanburg, S. C.
Smythe, Henry B. ..... Charleston, S. C.
Stoddard, Robert L. ..... Spartanburg, S. C.
Stephen, James B. ..... Spartanburg, S. C.
Swink, Harrison R. ..... Gaffney, S. C.
Toms, Jerry F. ..... Columbia, S. C.
Traxler, William Byrd ..... Greenville, S. C.
Turner, James R. ..... Spartanburg, S. C.
Walker, Wesley M. ..... Greenville, S. C.
Walsh, T. E. ..... Spartanburg, S. C.

Warren, Joseph Preston ..... Charleston, S. C.
Watts, J. U., Jr. ..... Darlington, S. C.
Woodward, James T. ..... Columbia, S. C.
Workman, J. W. ..... Union, S. C.

At this time, the Chair recognized Honorable John J. Parker, Senior Judge of the Circuit Court of Appeals of the Fourth Judicial Circuit, who entered the Association meeting at this time.

The Report of the Committee on the Unauthorized Practice of Law was then presented by Mr. J. D. E. Meyer, Chairman:

REPORT OF COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW

Mr. President and Brethren of the Bar of South Carolina:

Your Committee on Unauthorized Practice of Law begs leave to submit the following Report:

The unauthorized practice of law before the Courts and Administrative Agencies of our State is something of which South Carolina is practically free. For those interested in the views of our Court on this subject we refer to: In re *Duncan* (1909) 85 S. C. 186, 65 S. E. 210, and *State v. Wells,* (1939) 191 S. C. 468, 5 S. E. (2) 181.

The practice of laymen, who are not trained and qualified as lawyers, appearing on behalf of clients in matters involving important statutory and/or constitutional rights is something which has developed with the growth of the administrative agencies and bureaus of our Federal Government. In the early life of our Federal Government, there were but three agencies; about the time of the Civil War we had about eleven agencies; by 1930 we had about thirty agencies; by 1940 we had about fifty agencies; by 1949 we had two hundred fifty-three agencies, departments, bureaus, commissions, boards, etc., adjudication important statutory and/or constitutional rights of our citizens. Each of these agencies, departments, bureaus, commissions, boards, etc., adopts its own rules regarding who may practice before them. Fourteen of these administrative agencies including the Treasury Department, the Social Security Administration, the Federal Power Commission, the Interstate Commerce Commission, the Patent Office, the National Labor Relations Board, the Custom Department and seven others permit laymen who are not trained and qualified as lawyers to represent clients before them.

In May 1949, Senator Guy M. Gillette, of Iowa, introduced in the 81st Congress his Bill S-1944 entitled "A Bill to protect the public with respect to the practice of the law, by those other than duly licensed attorneys and counselors at law, before the United States Government departments, bureaus, commissions, and agencies and in the United States tax courts". Previous to the introduction of this Gillette Bill, the American Bar Association had sponsored what is known

as the Walter Bill, H.R. 4446 which had been introduced in The House of Representatives on April 29, 1949, and which was entitled "A Bill to protect the public with respect to practitioners before administrative agencies".

Your Committee has examined copies of both of these Bills. The Walter Bill will create another agency or commission, a Credential Committee. It will employ a secretary, a staff, and create more burdens for the taxpayers. It also provides that the term "agency" shall not include the Tax Court of the United States. The Credential Committee may incur obligations, make rules, fix compensatory admission and renewal fees. No person can practice before any bureau, agency, department, commission, or board without a credential in good standing from this Committee. This means additional trouble and expenses for every attorney.

The Gillette Bill creates no new agency or bureau. It creates no additional burden for the attorney nor for the taxpayer. It covers all Government departments, bureaus, commissions and agencies, and the United States tax courts. It provides that such terms as "Federal Practitioner", "Government Practitioner", "Department Practitioner", "Income Tax Expert", "Income Tax Consultant", "Tax Law Adviser", "Business Law Counselor", "Business Law Adviser", "Workmen's Compensation Law Consultant", "Labor Law Counselor", "Labor Law Expert", "Labor Law Adviser", "Health Law Practitioner", "Cooperative Law Consultant", are forbidden; and any other similar designation, name, or title which might induce or lead the public to believe that such person using such title is or has been duly qualified, educated and trained in the law to the extent necessary for obtaining a license to practice law as defined in the Act, is also forbidden. It provides that "No person shall represent any 'member of the public' before any Government department, commission, bureau, or agency or in the United States tax courts, where said 'member of the public's' statutory or constitutional rights are involved, who is not an attorney or counselor at law qualified to protect such 'member of the public's' constitutional and statutory rights and present legal evidence and make a record in any proceeding pending to the end and purpose that the decision affecting the rights of the person so represented may be judicially reviewed by a court of competent appellate jurisdiction against abuses or alleged abuses or other error or errors of administrative law or authority". For a violation of this section such person shall be punished as provided in the Act. For brevity, we have only referred to the important features of this particular proposed legislation.

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Your Committee desires to go on record as being opposed to the Walter Bill, H.R.-4446.

Your Committee recommends that the Members of the South Carolina Bar Association, in convention assembled, do go on record as heartily endorsing the Gillette Bill, S-1944, and that copies of this Report be forwarded by the Secretary of our Association to each of our United States Senators and to each of our Members in the House of Representatives of the Congress of the United States, and to Senator Guy M. Gillette, the author of Bill S-1944.

Following the Report of the Committee on the Unauthorized Practice of Law, it was moved by Mr. Meyer and seconded by Mr. Graydon that a copy of this Report be mailed to every member of Congress from the State of South Carolina.

The Secretary then presented the Report of the Committee on Administrative Law:

REPORT OF COMMITTEE ON ADMINISTRATIVE LAW

To the South Carolina Bar Association:

Your Committee on Administrative Law begs leave to report as follows:

Our predecessor Committee made a report at the 1949 meeting of the Association wherein the opinion was expressed (quoting from the report):

> "that the law should be amended so as to provide that the Courts, upon an appeal from the Industrial Commission, shall have the same powers and duties as upon an appeal or review in an equity case;" (and continuing to quote from the report) "we believe there is sound reason for such an amendment, when it is observed that the Workmen's Compensation Act is really based upon an extension of the fundamental principles of equity, resulting in remedies unknown to the common law. The result of such a change would simply mean that a Court review of the action of the Industrial Commission upon the facts of any claim must be governed by the preponderance of the evidence, in the light, however, of the established presumptions in equity in favor of the respondent. Such a change in the law would not in any wise be radical, for even under the present Act the power of the Court to review the facts, in accordance with the preponderance of the evidence, is recognized in all *jurisdictional* matters. *Miles v. West Virginia Pulp & Paper Co.*, 212 S. C. 424, 48 S. E. (2nd) 26.

> "We are also of the opinion that it should further be provided in such an amendment, that upon an appeal from the Industrial Commission the same rule would apply as upon appeals from inferior Courts (notwithstanding the fact that the Industrial Commission is not recognized as a Court), to wit, that upon appeal, judgment shall be given 'according to the justice of the case without regard to technical errors and defects which do not affect the merits'; in accordance with Section 804, Code 1942."

In accordance with these views, it was recommended that the report be referred to the Committee on Legislation looking to the amendment of the Workmen's Compensation Act by the General Assembly in accordance, or substantial accordance, with the suggestions contained in the above quoted excerpt.

There was, however, no discussion of the report by the Association, and it was understood that the matter would be referred to the succeeding Committee on Administrative Law, and the hope was expressed that in the meantime the members of the Association would give consideration to the proposed change in the present statutory law. It was not, however, contemplated at that time that the succeeding Committee would be, to the extent of four of the members, identical in personnel with the 1949 Committee.

We have, therefore, further considered the former recommendation, and our conclusion is that the adoption of the proposed amendment by the Legislature would be in furtherance of justice, both to employees and employers, and that it would tend to maintain or restore confidence in the Workmen's Compensation Act and the administration thereof. The importance of the Industrial Commission and its extensive activities will appear by reference to the great number of appeals which come before the Supreme Court, to say nothing of those disposed of in the Circuit Court and the many claims which do not reach the Courts. We therefore respectfully renew the former recommendation.

Administrative Law is largely a modern development, due to the exigencies and complexities of present day civilization. Administrative boards have important duties to perform, and while they are more or less executive in character, many of them are at least *quasijudicial,* for, while primarily they may be considered fact finding bodies, their conclusions are necessarily based upon the application of legal principles. Hence the importance of judicial review is clearly indicated.

While not within the scope of our recommendation, we believe it would be of interest to make reference to the proposed Federal Administrative Court embodied in bills introduced in the present Con-

gress, for this likewise tends to show the vital importance of judicial review of agency and administrative action; and we venture to think that the day may not be far distant when such a Court as this will be deemed desirable in South Carolina. We take the liberty of making the following quotations from the interesting article on the proposed Federal Administrative Court by Louis G. Caldwell, of the District of Columbia Bar, in the American Bar Association Journal, January, 1950:

> "The Bill sets up a five-judge court, to be known as the Administrative Court of the United States. It confers upon this court jurisdiction (1) in any case involving the judicial review of agency action, otherwise cognizable or pending in any court of the United States other than the Supreme Court, and (2) in any case involving the civil enforcement of the rules, orders or investigative demands of any such agency."
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> "The present jurisdiction of the United States District Courts and the Courts of Appeals is preserved, so that in effect persons affected by agency decision have an option to go before these courts insofar as they may do so under present law. There is language in the Bill which may be construed to confer upon the new court a scope of review somewhat greater than is now conferred upon the District Courts and the Courts of Appeals in some classes of cases. This may serve to attract appeals to this Court. Even if this is not so, since the tribunal is a legislative court, Congress will be free to enlarge its scope of review beyond what it may confer on the constitutional courts."

Next, the Report of the Committee on Uniform State Laws was presented by Mr. D. W. Robinson, Jr.:

REPORT OF THE COMMITTEE ON UNIFORM STATE LAWS

To the South Carolina Bar Association:

Your Committee on Uniform State Laws would respectfully report:

1. That under date of the 13th of February 1950 the Governor approved the Uniform Partnership Act. This is the only uniform Act approved this year.

In the opinion of the Committee the passage of the Partnership Act is a landmark in the field of business law in South Carolina. By reason of the fact that Federal income and estate taxes are now a

major factor to be considered by all business and since frequently it is advantageous from a tax viewpoint to operate under a partnership form, the enactment of this statute would be of great benefit to South Carolina business.

Without a partnership statute many persons are unwilling to go into a partnership form of business because of the uncertainties as to what court rulings would be made with reference to the various problems which arise in partnership law. The statute by determining these rights and liabilities has placed it within the power of the South Carolina lawyer to accurately advise his client as to the effects of a partnership arrangement.

2. The only other uniform Bill now before the General Assembly is House Bill 1975, Uniform Out-of-State Divorce Recognition Bill. In the opinion of your Committee the enactment of this statute would be a great help to the South Carolina practitioner and to the citizens of the State. It would permit the practitioner to advise his client as to the effect of a foreign divorce with some degree of certainty and it would discourage bona fide South Carolina citizens from seeking quick divorces in other states.

Your Committee recommends that the Bar Association approve the enactment of the Uniform Out-of-State Divorce Recognition Bill and that the individual members of the Association urge their legislators to pass it.

A Resolution was then presented by Mr. Robert J. Gantt, expressing the regret of the Association as to the absence of Judge Sease:

RESOLUTION

THE SOUTH CAROLINA BAR ASSOCIATION

BE IT RESOLVED by the South Carolina Bar Association:

That we note with regret the absence of our distinguished member, Honorable Thomas S. Sease.

That we extend to your Honor our Greeting and plead in your behalf to the highest Judge.

That there be extended to thee the same mercy that would be shown were thou still the Judge and Thy Creator thou.

The Chair at this time recognized Mr. Calhoun Thomas, who called attention to the Association of the work of the Law School Committee. He highly praised the untiring efforts of each and every member of

the Committee and commended their work and accomplishments to the Association. A rising vote of thanks was then given the Law School Committee by the Association.

The Chair next recognized Judge Parker, who expressed to the Association his delight and pleasure at meeting with the Association and who congratulated the Committees on their fine Reports as rendered and congratulated the officers of the Association for the work being carried on.

Mr. Graydon then expressed his personal appreciation to the Spartanburg Bar for their work in making the meeting possible in Spartanburg. Mr. Frank P. McGowan then moved for a vote expressing the appreciation of the Association to the Spartanburg County Bar for all arrangements for the meetings and festivities held. This motion was seconded and unanimously passed.

Mr. E. P. Riley, President of the Greenville Bar Association, was then recognized, and Mr. Riley extended an invitation from the Greenville Bar for the Association to hold its 1951 meeting in Greenville. This matter was referred to the Executive Committee of the Association.